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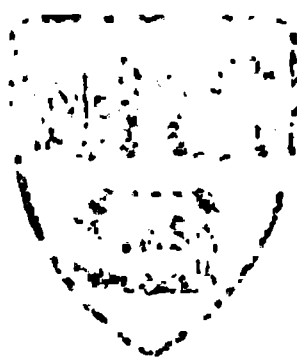
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VOL. 18—LOUISIANA REPORTS.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT

OF
THE STATE OF LOUISIANA.



By THOMAS CURRY,
Counsellor and Attorney at Law,
AND REPORTER OF THE DECISIONS OF THE SUPREME COURT.

VOLUME XVIII.

NEW ORLEANS.
PRINTED BY E. JOHNS & CO.,
CORNER OF ST. CHARLES AND COMMON STREETS.
1841.

JUDGES OF THE COURT.

HONORABLE F. X. MARTIN.

“ **H. A. BULLARD.**

“ **A. MORPHY.**

“ **E. SIMON.**

“ **R. GARLAND.**

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, APRIL TERM, 1841.

LEEFE *vs.* WALKER ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The plaintiff is bound by the admission of the party under whom he claims, **EASTERN Dis.**
when there is no fraud or collusion alleged by him. **April, 1841.**

A party chartering a vessel is bound to the owners, and the captain as their
agent, has a right to retain the whole amount out of the cargo, whether the
adventure was joint or entirely owned by this party. **LEEFE**
vs.
WALKER ET AL.

An attaching creditor cannot avail himself of any complaint or claim his
debtors might have on a third party for damages, on account of unusual delay
in a voyage.—Until they complain the plaintiff cannot attach their action for
damages.

An attachment levied on the two thirds interest of the debtor in the cargo
cannot avail, unless there is *a surplus*, after paying all the charges and
losses on the vessel and cargo.

This is an attachment suit. The plaintiff alleges that D. and
J. B. Walker of Mobile, lately trading under the firm of

CASES IN THE SUPREME COURT

EASTERN DIS. Walker, Knight & Co. in New Orleans, are indebted to him
April, 1841.

LEEFE
vs.
WALKER ET AL. Orleans, which he attaches and prays judgment for the
 amount of his claim. He propounds interrogatories to said
 firm and cites them as garnishees who answered, among
 other things that the log-wood belonged jointly to the defen-
 dants and captain Taylor, of the schooner Rosario in which it
 was imported from Tabasco in Mexico.

Taylor now intervened and claimed the property attached,
 and prayed that it be delivered up to him. John Murray also
 intervened.

The facts and evidence of the case as developed in the
 opinion of this court, exhibit the nature of the controversy and
 need not be recapitulated. The presiding Judge rendered
 judgment against the defendants for the amount of the plain-
 tiff's demand; sustained the intervention of Taylor for the
 property attached; and dismissed the intervention of Murray,
 and also the attachment of plaintiff, who appealed.

Micou & Lockett, for the plaintiff and appellant, insisted
 that the intervenor had exhibited no proof of his claim of one
 third interest in the cargo, one of the depositions being re-
 jected. But as he contends it was a joint adventure, there is
 an end to the charter party of the vessel, and the defendants
 Walker, Knight & Co. are only bound for their proportion of
 this charge.

2. The intervenor being the captain of the vessel has totally
 failed to give a satisfactory account for his great delay; having
 extended the voyage to 5½ months to a Mexican port. He has
 no right to charge the defendants with \$2750 for the long
 delay in making the voyage.

3. The defendants owning two thirds of the cargo, the
 plaintiff has a privilege on the proceeds of the log-wood to
 this extent and which must remain subject to his attachment.

Briggs, for the intervenor and appellee, urged the affirmance of the judgment.

EASTERN DIST.
April, 1841.

Garland, J. delivered the opinion of the court.

LEEFE
VS.
WALKER ET AL.

This suit was commenced by attachment; the plaintiff claims \$1000 of the defendants, and cites *J. Roberts & Co.* as garnishees. He propounded interrogatories to them to ascertain if they have not in their possession a quantity of log-wood belonging to *D. & J. B. Walker*, two of the defendants, which was imported in the schooner *Rosario* from *Tabasco*, or the proceeds thereof if sold. The garnishees in their answers, say they know of no interest *Walker, Knight & Co.* or *D. and J. B. Walker* have in the log-wood. That it was consigned to them by *Manuel Peyro* of *Tabasco*, who instructed them to sell it, invest the proceeds in dry goods and ship them to his address. After the filing of these answers, the plaintiff came into court and took issue with the garnishees and again alleged the log-wood or its proceeds belong to the defendants. Some time after the joining of this issue, *Josias Taylor* intervened, alleging the property in the hands of the garnishees belonged to him, and if the defendants had any interest in it, he had a claim on it of a higher nature than the attaching creditor.

Some other persons were made parties to the suit, the debt was clearly proved to be owing by *Walker, Knight & Co.*, and some funds were adjudged to be paid the plaintiff, but a judgment was given in favor of *Taylor*, from which the plaintiff appealed. There is no other controversy before us than the question whether the log-wood or its proceeds can be appropriated to pay the debt for which suit is brought.

In the month of February, in the year 1839, *Josias Taylor* being the master, and agent for the owners, of the schooner *Rosario*, then lying in the port of *Mobile*, entered into a contract with *D. & J. B. Walker*, by which the last named persons chartered the schooner at the rate of five hundred dollars per month to go on a trading voyage to *Truxillo* and thence to

EASTERN DIS. New Orleans, two thirds of the cargo belonging to the
April, 1841. Walkers, and the other third to captain Taylor. The vessel
 was cleared for Truxillo, but put into Tabasco, as it was said
 in distress, although it seemed to have been the intention of all
 the parties she should go there, and the clearance for Truxillo
 was intended to evade the French squadron then blockading
 the port of Tabasco. In consequence of the manner the ves-
 sel entered the port and other causes, the captain encountered
 many difficulties from the custom house officers in landing and
 disposing of the cargo. A considerable portion of it was in-
 jured and heavy expenditures incurred in the sale of it, besides
 a long detention of the vessel, the voyage having lasted about
 five and a half months. There seems to have been a heavy
 loss on the adventure.

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The instructions of the Walkers to captain Taylor are dated at Mobile, on the 16th February, 1839, and say, "you are hereby requested to proceed hence to the port of Truxillo, or any other port you may believe best, and make disposition of our two thirds of your cargo (as per invoice furnished,) to the best advantage, for cash, and after such disposition, you will invest the nett proceeds if any, after paying the charter of the schooner and port charges in log-wood, hides or any other article you may think best, and return with the same to New Orleans, or any other port in the United States you may believe most practicable, and dispose of the same." These instructions very specifically state the destination of the vessel, the manner of disposing of the cargo, the interest of the Walkers in it and the application of the proceeds. The evidence does not show that captain Taylor failed to comply with them or that the voyage was intentionally prolonged; but it satisfies us, all the parties contemplated a voyage in which there would be great hazard. Their purpose was to enter a blockaded port with prohibited articles, and they must necessarily have calculated on unusual risk, embarrassment and detention, and it appears the calculation was not incorrect.

The proceeds of the cargo was invested in log-wood and

there not being enough to fill the vessel, the captain borrowed money at Tabasco to purchase an additional quantity and pledged the cargo to one Peyro for the repayment, in whose name the whole appears to have been shipped, consigned to Roberts & Co., but on the back of the bill of lading it is stated that captain Taylor is to pay Peyro \$1219 60 in New Orleans, "money advanced to purchase the within express cargo, and the moment captain Taylor discharges the above sum the cargo is entirely at his own disposal." It does not appear the Walkers or the plaintiff ever paid any part of that sum, or that captain Taylor ever did, but we infer he did, as he renders an account of sales of the log-wood. That account we have examined; it appears to us fair and the defendants by it are in debt to the intervenor after having credit for the nett proceeds of the whole adventure.

But the plaintiff says, that captain Taylor did prove he had paid his third of the outward cargo. Several replies might be given to this objection, but a conclusive one is, that the Walkers in their letter of instruction, say only two thirds of the cargo, belongs to them. The plaintiff must be bound by their admissions as he claims under them and does not allege any fraud or collusion between the parties.

It is next urged that as the adventure was joint, the charter of the vessel was annulled, and the Walkers ought not to be charged with their proportion of the amount to be paid for her. No reason is given or authority cited to establish this position and it appears to us a sufficient answer, that the vessel was not the property of captain Taylor, and the sum fixed in the charter party, was for the benefit of the owners, whose agent he was and for whom he retained it, out of the proceeds of the outward and inward cargoes, as we think he was authorized to do.

It is next alleged the voyage was unnecessarily long, and that the Walkers ought not to be charged for the whole time the vessel was employed. It is possible they might have some cause to complain of this, but as they have not, we know

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The plaintiff is bound by the admissions of the party under whom he claims, when there is no fraud or collusion alleged by him.

A party chartering a vessel is bound to the owners, and the captain as their agent, has a right to retain the whole amount out of the cargo, whether the adventure was joint or entirely owned by this party.

An attaching creditor cannot avail himself of any complaint or claim his debtors might have on a third party for damages on account of unusual delay in a voyage. Until they complain the plaintiff cannot attach their action for damages.

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An attachment levied on the two thirds interest of the debtor in the cargo cannot avail, unless there is a surplus, after paying all the charges and losses on the vessel and cargo.

of no right the plaintiff has to attach their action for damages. Finally it is said, that as two thirds of the cargo belonged to the defendants, the proceeds are liable to the attachment of the plaintiff. We have no doubt that the nett proceeds are liable, and if the plaintiff had shown there was any surplus after paying the expenses and losses incurred during the voyage, we are equally confident it would have been ordered to be paid to him, by the Judge of the Commercial Court, but as he has failed in establishing this fact, we see no error that calls for our correction.

The judgment of the Commercial Court is therefore affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The rule that a party wishing to avail himself of the confessions made by the adverse party cannot divide them and must take them entire, does not apply to the *admissions made in the pleadings*; but only to answers to interrogatories, or to *judicial confessions*.

Admissions in the answer are sufficient to dispense the plaintiff with proving his demand; and the *onus probandi* lies on the defendant to establish his defence. He who pleads payment admits the existence of the debt, and must prove payment, or the plaintiff will have judgment.

This is an action to compel the defendant, Henry Parish, to deliver up a bill of exchange, in his possession and deposited in the Canal Bank.

The plaintiffs allege they agreed to sell the defendant a bill of exchange for \$1450, drawn by Picket, Banks & Co., on John B. Diggs, and by the payees and these petitioners endorsed, to be paid for immediately in Mississippi funds at par; and which was delivered to the defendant, who has failed to com-

ply with his engagement; having only paid \$500. They pray that the bill be delivered up to them as their property, or in default thereof, that the defendant pay to them the sum of \$950; and that they have a privilege on the bill or its proceeds to secure payment.

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The defendant, after pleading the general issue, admitted the purchase of the bill and payment of \$500; and for the remainder, avers he transferred, to the plaintiffs, a debt due to him by the commercial firm of E. B. Cook & Co., of Vicksburg, which he states they agreed to receive according to certain arrangements and circumstances, &c. He further shows that he has suffered damages in the sum of \$1500, by the sequestration of the bill in question, which he claims in reconvention.

Upon these pleadings and issues the case was tried.

The plaintiffs offered no proof, but relied on the admissions of the defendant in his answer.

The district judge, however, decided that the admissions in the answer could not be divided; but must be taken entire; and although they admitted the purchase of the bill, they at the same time showed its payment. There was judgment against the plaintiffs, in the main suit, and in favor of the defendant for the amount of the bill, on the reconventional demand.

The plaintiffs appealed.

I. W. Smith, for the plaintiffs and appellants, insisted that the judge *a quo* erred in deciding that the admissions in the defendant's answer, must be coupled with his statement of facts tending to show his own right to the draft sequestered. This rule does not apply to the admissions made in the pleadings, but to answers to interrogatories only. Were it otherwise, the debtor who admits the debt and pleads payment or other matter in discharge, might require his admission and plea to be taken together. *Code of Practice, art. 477.*

2. The judge *a quo* erred in refusing to strike out the plea in reconvention. There was no connexity, and the plaintiffs cannot be said to reside out of the state, when one of them resides

EASTERN DIST. in New Orleans. The amendment of 1839 is not applicable.
April, 1841. *Acts of 1839, p. 164, sec. 7.*

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3. The evidence of the plaintiffs' liability is insufficient. It was no fault of the plaintiffs that the draft was not protested. The sheriff should have had it protested. There is no proof of the acceptors insolvency.

Peyton, for the appellee.

Simon, J. delivered the opinion of the court.

This is an action in which the plaintiffs seek to recover possession of the Bill of Exchange which was the subject of the suit of *Parish vs. Hozey, sheriff*, lately decided by this court, *ante*. They represent that on the 15th of April, 1839, they agreed to sell, to the defendant, a Bill of Exchange, &c. amounting to \$1450, that said defendant did not comply with the principal condition of the contract, which was to pay the whole amount of the price thereof immediately, but only paid \$500 on account of said price; and that consequently they have remained the owners of the bill. They further state that the defendant, having obtained possession of said bill, deposited the same, for collection, in the New Orleans Canal and Banking Company; that he and said bank are bound to deliver it up to them, and that, at all events, should they be unable to prove their title as owners of the bill, they are entitled to the vendor's privilege on the same or its proceeds for the balance of said price. They pray that the defendants be condemned *in solido* to deliver up the bill in question, &c., and that the same be sequestered according to law.

A writ of sequestration was issued, by virtue of which the sheriff took said bill into his possession and safe keeping; and afterwards the defendant joined issue by alleging the bill of exchange, sequestered, to be his property in consequence of his having purchased the same from the plaintiffs, and of his having paid the price thereof, in the manner by him stated in his answer. Defendant further averred that by the sequestra-

tion of the bill he has been deprived of the money; that in consequence of said sequestration, the sheriff failed to have it protested at maturity, and that he, (defendant, Parish) has sustained damages to the amount of \$1500, which he pleads in reconvention. The District Court rejected the plaintiffs' demand, and rendered judgment against them on the reconventional plea set up by the defendant, for the whole amount of the bill of exchange; from which judgment, said plaintiffs appealed.

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No evidence whatever was adduced by the plaintiffs in support of their action; they solely relied on the admissions of the contract of sale and of the consideration thereof, contained in the defendant's answer, expecting that said defendant should be required to prove the payment by him alleged; and it is now contended by their counsel that the judge *a quo* erred in deciding that those admissions must be coupled with the defendant's statement of facts, tending to show his discharge, and his own right to the bill sequestered.

We cannot concur in opinion with the inferior court: The plaintiff's action is based on an alleged contract of sale of the bill of exchange in question; the price, as they state, was \$1450, payable immediately on the delivery of the bill, in current Mississippi funds to be taken at par, a part of which, (\$500) was paid in cash by the defendant, and judgment is prayed for the return of said bill or for the balance of its price. The defendant admits that he purchased the bill from the plaintiffs, and that he paid \$500 in cash on account of the purchase money; but he further states, in his answer, that he paid the remainder in the transfer and assignment of a debt then due to him by the commercial firm of E. B. Cook & Co.; that the plaintiffs agreed to look to them for the said remainder; that the firm of Cook & Co. agreed and promised to pay said plaintiffs the amount due by them to the defendant, so transferred in payment of the balance of the purchase money, and that such was the agreement at the time of the purchase, and that the plaintiffs consented to receive a verbal transfer of said debt of Cook & Co. and the sum of \$500 *in full payment* of

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the price of the said bill of exchange and to release defendant from all recourse or claim against him, &c.

The defendant having admitted the material facts alleged in the plaintiffs' petition as the foundation of their action, said plaintiffs had perhaps nothing to prove; but it was clearly the duty of the defendant to establish, by legal evidence, all the other matters by him set up in his answer, going to show his compliance with the terms of sale by the payment of the whole amount of the price thereof.

The rule that a party wishing to avail himself of the confessions made by the adverse party cannot divide them and must take them entire; does not apply to the admissions made in the pleadings, but only to answers to interrogatories or to judicial confessions.

The rule that a party wishing to avail himself of the confessions made by the adverse party, cannot divide them, and must take them entire, does not apply to the *admissions made in the pleadings*, but only to answers to interrogatories; *Code of Practice, Art. 356*; or to judicial confessions made according to the *Art. 2270 of the Louisiana Code*; the reason is, with regard to answers to interrogatories, that they are called for by the other party, that they are sworn to, and that it is not to be presumed that a party would state under oath any fact which he knew to be false. But to carry the rule further and to apply it to the matters which are pleaded by a party in his answer in evidence of the plaintiffs' demand, after his having admitted the debt or obligation, would, in our opinion, be a strange and absurd doctrine. It is of every day's occurrence, in practice, that a debtor, who is sued on a contract or note, admits its existence or his signature thereto, and then set up a plea of payment or other matter in discharge of his adversary's claim. Surely, it cannot be pretended that, in such case, the defendant would acquire his discharge from the obligation or debt sued on, because, after having spared to his adversary the trouble of proving the signature to the note or execution of the contract, he thought proper to set up a plea of payment, which is often unfounded, and sometimes resorted to to make a show of defence. This would be a very dangerous practice, and, to say the least of it, a very inconvenient one; as, for fear of endangering their rights plaintiffs would always think themselves bound to prove their obligations, notwithstanding the

written waivers or admissions contained in the answers of their opponents. We have, however, repeatedly held that such admissions are sufficient to dispense the plaintiffs with proving their demands, and that the *onus probandi* lies upon the defendants to establish their defence: Thus, in the case of *Jones vs. Bishop*, 12 *Louisiana Reports*, 398, this court said that the plea of payment admits the existence of the debt, and that, therefore, unless the defendant can prove payment, the plaintiffs will have judgment. Our jurisprudence is well settled on this subject, and the judge *a quo* ought to have required the defendant to prove the payment by him alleged in his answer, beyond the \$500, admitted on both sides to have been paid in cash, at the time of the purchase; and if he had not done so, judgment should have been rendered against the defendant for the balance of the purchase money. However, as the defendant's counsel, though able to establish the facts by him alleged, may have been under the impression, from the opinion of the lower court, that it was not necessary to adduce his proof in support of his defence, we think justice requires that this case should be remanded for further proceedings.

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Admissions in the answer are sufficient to dispense the plaintiff with proving his demand; and the *onus probandi* lies on the defendant to establish his defence. He who pleads payment admits the existence of the debt, and must prove payment, or the plaintiff will have judgment.

The present state of this cause makes it unnecessary to examine the questions arising from the reconventional demand set up by the defendant, who, within our recent knowledge, having already exercised successfully his recourse in damages against the sheriff, would perhaps carry his pretensions too far, if he was again to attempt to make the plaintiffs liable for a loss for which we lately rendered a judgment in his favor against the person by whose fault it was shown to have been sustained; 17 *Louisiana Reports*, 578.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court, be annulled, avoided and reversed; and that this cause be remanded for a new trial according to the legal principles above established; the defendant and appellee paying costs in this court.

CASES IN THE SUPREME COURT

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POYDRAS *vs.* TAYLOR ET AL.

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OF POINTE COUPER, THE JUDGE OF THE 2D DISTRICT PRESIDING.

There is no discrepancy between the cases of *Moosa vs. Allain*, 4 Martin, N. S. 99. and that of *Poydras vs. Mourain*, 9 La. Reports, 492. The first is a slave suing for certain privileges under a Will, who has no capacity to stand in judgment in any matter, but for his freedom; and the last is the heir claiming a compliance with the conditions of the same Will from the purchaser under it.

The purchaser of a plantation and slaves subject to the provisions of the Will of the original proprietor, that the slaves are always to be kept on the plantation and never sold apart from it, must comply with the conditions however onerous.

This is an action against the defendant, Taylor, and his vendees and co-defendants Coyle, Falconer, Jontes, Laurans, Hiriart and Sneed, to compel a compliance with the terms and conditions of the Will of the late Julien Poydras, which required his plantations and the slaves on each to be sold together and the slaves on each, kept, maintained and emancipated thereon under certain regulations, and in a specified manner. The defendant, Taylor, had become the owner of one of these plantations, under the conditions of said Will, and had sold several of the slaves attached thereto, to his co-defendants, when the plaintiff as one of the heirs and relatives of Julien Poydras, instituted this suit, alleging the illegality and nullity of the sales of said slaves, as having been made in contravention of the provisions of said Will. He prays that all these sales be annulled, and that the slaves therein mentioned be restored to the plantation from whence they were taken, and there kept and maintained according to the testamentary dispositions of the said Julien Poydras. This case has already been before this court. See 9 La. Reports, 488: and also the case of *Poydras vs. Mourain*, *Idem*, 492, in which the clauses of J. Poydras's Will, drawn in question in these cases, are recited and set forth.

In an elaborate opinion of the District Judge he came to

the conclusion that the plaintiff ought not to succeed. There was judgment for the defendants, and the plaintiff appealed.

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L. Janin, for the plaintiff.

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Mitchell & Eustis, for the defendants.

Garland, J. delivered the opinion of the court.

This case has already been before the court on a point not affecting the merits, in the decision of which, the object of the plaintiff in instituting the suit is stated and the material facts detailed. See 9 La. Rep. 488. The case is now before us on a final judgment in favor of the defendants, from which the plaintiff has appealed. The points to be decided, arise under those clauses of the Will of the late Julien Poydras, relating to the slaves on his different plantations at the time of his death, which provisions are fully stated on page 493 of the volume referred to. Taylor, the principal defendant, purchased one of those plantations with the slaves on it, with an express stipulation, that he took it and them subject to all the obligations and conditions imposed by the Will, and he further engages to comply with all those conditions and discharge the obligations according to their tenor, which relate principally to the emancipation of the slaves at a certain period, and keeping them on the plantation until that period arrives.

In May, 1835, Taylor sold a number of these slaves to his co-defendants, which sales, the plaintiff alleges are in violation of the contract and title under which he holds them and the plantation, and he asks that they be annulled and the slaves replaced in the possession of the seller. The principle involved in this case was decided in the case of Poydras vs. Mourain, 9 La. Rep. 492, which was before us in a form of action somewhat different, but seeking the same object, that is, to preserve the property in the condition the testator designed it should remain, until the time shall arrive when the provisions of the Will are to take effect. That was an injunction to arrest a sale about to be made, this suit is to annul

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sales of property similarly situated, already made. Both involve the question whether the slaves can be sold separate from the plantation they are on.

The judgment of this court in the case of Poydras vs. Mourain seems to us to settle this, and if it were not that the District Judge who tried this cause, and the counsel for the appellees insist so strenuously that that decision is contrary to the one given in the case of Moosa vs. Allain; 4 N. S. 99, we should at once give a judgment in favor of the plaintiff. But when a Judge so learned as he who tried this cause, reviews so critically the opinion of this court and dissents from and overrules it, on the ground that a previous and contradictory judgment has been rendered by it, we feel bound to pause, and examine how the facts are, and if opposing opinions exist, then to decide which is the most reasonable and just, and conform our judgment to it. We have therefore diligently examined the two cases and shall endeavor to show no such contradiction exists as is alleged.

In ascertaining what the decision of any court is in a particular case, it is important that the statement of the pleadings and facts should be separated from the judgment, and it is not to be taken for granted that all the recitals in an opinion have the approval of the court. A neglect of this necessary precaution has perhaps led the learned Judge into a mistake, which he will probably discover when he shall again examine these cases.

Moosa was a slave of the late Mr. Poydras, on one of the plantations at the time of his decease, and was with other slaves, sold with it to Allain under the provisions of his Will. Allain afterwards sold him separate from the plantation, and Moosa, who was a slave, brought suit against Leblanc the vendee and Allain the vendor, to annul the sale and cause himself to be restored to the plantation. The court decided that the plaintiff was a slave and in an action of that kind could not sue or stand in judgment, and therefore decided against him. The questions which the slave wished to have

decided were not considered at all, and the presiding Judge of this court in giving its judgment in the case of Poydras vs. Mourain says so expressly. He says they could not be, as Moosa had no right to appear in court at that time. 9 La. Rep. 504. In the other case the right of the plaintiff to sue was maintained and a judgment rendered on the points in controversy, which we do not see any reason for changing.

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In both the cases cited, the court has said the power of the master over the person of the slave is absolute until the time fixed for his emancipation shall arrive, and he is entitled to his labour wherever he chooses to have it performed, but that does not involve the power to sell, or so dispose of the slave, as to prevent him at the proper time from exercising the rights conferred by the Will, or to render the exercise of them so burdensome, precarious and difficult as to make the rights themselves almost, if not quite worthless.

We shall not upon the invitation of the counsel for the appellees, or following the example of the District Judge, be drawn into any decision upon the testamentary dispositions of Mr. Poydras in relation to the emancipation of his slaves, the annual stipends to be allowed them and their residence upon the plantations to which they belong. The time for such a discussion has not arrived, and those as much or more interested than the defendants in these questions are not before us. The public, the heirs and the slaves will have a deep stake in the questions that will arise some years hence; until then, we shall only use our conservatory powers to keep the slaves and property in the situation intended by the testator.

The defendant, Taylor, by the very title he holds his property, is bound to comply with certain onerous conditions imposed by him from whom he derived it. He seems desirous of escaping from the performance of those obligations, and interposes the objections he may be likely to encounter in the effort and various questions of public policy, as reasons why he should not attempt it; all of which it would, perhaps, have been more prudent for him to have considered before making

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the purchase. The zeal now manifested for the peace, happiness and prosperity of the country is so nearly and obviously allied with private interest, as to deprive it of the charm or merit of disinterested patriotism. As he has made the contract he must abide by it, until all interested shall have an opportunity of being heard, and then we have no doubt justice will be extended to all.

In the present state of the case, we cannot proceed to judgment between the defendant, Taylor, and his co-defendants, on his warranty to them, or any questions arising out of the sale; the case, so far as it respects them, must be remanded to the District Court for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and this court proceeding to give such judgment as in its opinion ought to have been rendered in the court below, does further order, adjudge and decree, that each of the sales made on the 28th day of the month of May, in the year 1835, by the said William Taylor, to his co-defendants, slaves Genevieve, Harry Congo, Clarisse Hibou, Charles, Robin and Hannah, be annulled, set aside and rescinded, and each of said defendants are adjudged to restore the slave or slaves so purchased by him, to the possession of said William Taylor, there to remain attached to the plantation purchased by him of Bennett Barrow, as described in the sale on file in the record, until otherwise disposed of according to law. The costs which the plaintiff is entitled to recover in this court and the District Court, to be paid by the defendants. And it is further ordered that the case, so far as it relates to the claims of the defendants, Sneed, Coyle, Laurans, Jontes and Falconer, on their co-defendant, Taylor, in warranty, be remanded to the District Court, to be proceeded in according to law.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF

POINTE COUPÉE, THE JUDGE OF THE SECOND PRESIDING.

POYDRAS
vs.
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In a conservatory action, to enforce the provisions of a Will and cause to be rescinded the sale of certain slaves, made contrary to its provisions, a remote vendee of two of the slaves, residing in another parish, cannot be sued and made to answer at a different domicile from his own.

This is an action under the will of the late Julien Poydras, to enforce its provisions and rescind the sale of several slaves belonging to one of the plantations of the testator, now owned by the defendant, Taylor, who, it is alleged, sold off and separated these slaves from the plantation, contrary to the express provisions of the will of J. Poydras, and the conditions under which he purchased the plantation and slaves. Two of these slaves was sold to S. Hiriart, Esq., who resides in another parish from that in which suit is brought, to wit: in West Baton Rouge. Taylor, his vendor, is made a party; and he (Hiriart) is cited also, and required to answer to this suit in the parish of Pointe Coupée. He excepted, pleaded commorancy, and averred his domicile to be in West Baton Rouge. The exception was sustained and the plaintiff appealed. See 9 Louisiana Reports, 488, 492, and the preceding case of Poydras against Taylor et al.

L. Janin, for the plaintiff and appellant.

Eustis & Mitchell, for the defendants.

Garland, J. delivered the opinion of the court.

The object of this suit and the facts of the case are fully stated in the opinion of the court, delivered last week, in the case of Poydras *vs.* Taylor and others, *ante* 12. Hiriart was made one of the defendants in that suit, and it was alleged he was the purchaser of two of the slaves, affected by the will of the late Julien Poydras, which were sold to him (Hiriart) by Taylor, and the sale asked to be annulled. Hiriart excepted

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to the jurisdiction of the court, alleging and proving, he was a resident of the parish of West Baton Rouge. His exception was sustained, the suit, as to him, dismissed and the plaintiff appealed. We are of opinion there is no error in the judgment of the District Court. It is a well established law that every person must be sued in the parish where he has his domicil, unless in those cases where an exception is made to the general rule. There are a number of exceptions mentioned in our law, but we are unable to find one that will sustain the ground assumed by the plaintiff, and his counsel has not referred us to any.

In a conservatory action, to enforce the provisions of the will and cause to be rescinded the sale of certain slaves made contrary to its provisions, a remote vendee of one of the slaves residing in another parish, cannot be sued and made to answer at a different domicil from his own.

We have heretofore said that this suit was essentially conservatory. The plaintiff is not a privy or party to the contract, except, so far only, to see that the slaves, which composed the succession of Julien Poydras, deceased, shall remain in the condition he left them until the time arrives for the will to operate. The counsel for the plaintiff urges that as the judgment, if rendered in his favor, would operate upon both Taylor and Hiriart they ought to be sued together. That it may so operate to some extent, may be true, but it is not a sufficient reason to form an exception to the general provision. Hiriart it appears to us is the party most interested, and there is more reason for carrying Taylor to his parish to defend the suit; and that would probably be the result, if Hiriart should be sued in his own parish, as Taylor is his warrantor.

If Poydras was the vendor of Taylor and Hiriart a third possessor, and the suit was for a rescission of the sale, for any of the causes prescribed by law, it might make some difference, but upon that point it is not necessary to express an opinion in this case.

The judgment of the District Court is, therefore, affirmed with costs.

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MEEKER & LEWIS vs. HAYS ET AL.

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

MEEKER
&
LEWIS
vs.
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A sale of a stock of goods, although by notarial act, when shown to be in fraud of creditors, will not exempt them even in the vendee's possession, from *bona fide* attaching creditors of the vendor.

This is an attachment suit against the goods and effects of an absconding debtor. The plaintiffs show they are creditors of Wm. R. C. Hays, for merchandize sold and delivered according to a detailed account, and balance due on a note, which are annexed; amounting to \$1180. On the 21st February, 1840, the plaintiffs sued out an attachment, and on the same day levied on the contents of a clothing store, recently occupied and carried on by the defendant, then in possession of J. Burroughs. The goods were sequestered by the sheriff and taken into custody; and the vendors privilege claimed on them.

John Burroughs intervened and claimed all the goods and articles attached, in virtue of a notarial act of sale, of said stock of goods, consisting of clothing, hats, boots, shoes, and show-cases, with the fixtures and furniture, from the defendant, Hays, to him for the alleged price and sum of \$8510; five hundred dollars purporting to be in cash; the balance (all to \$598) was paid in Hays' notes. The act of sale bears date the 21st February, 1841, the same day of the attachment, and sequestration of the goods by the plaintiffs. Other creditors intervened. Evidence was adduced, showing the insolvency and absconding of Hays; and also touching the fairness of the sale of the goods in question. The sale was made for a gross or round sum according (as stated in the act) to an inventory and valuation annexed.

There was judgment for the plaintiffs, against defendant, for the amount of their demand, with privilege for a part and priority of attachment for the remainder; and also dismissing the petitions of intervention. Burroughs alone appealed.

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Kennicott, for the plaintiffs.

Larue, for the intervenor and appellant.

Hoffman, for the syndic of Hays, &c.

Garland, J. delivered the opinion of the court.

The plaintiffs levied an attachment on the property of the defendant, claiming the sum of \$1180 37, due on a note and account for goods and merchandize sold, on part of which they claimed the vendor's privilege and had them sequestered. Burroughs intervened in the suit, claiming all the goods attached and sequestered in the store occupied by Hays, on Levee street, as his property, alleging he had purchased them on the 21st of February, in the year 1840, and taken possession of them and the store in which they were, previous to the seizure. He produces a notarial act as evidence of the sale; the consideration is fixed at \$8510 31, the amount of an invoice annexed. Five hundred dollars it is said was paid in cash, the sum of \$7421 65, in Hays' own notes, and for the balance he gave his notes, payable at a future time. This sale the plaintiffs allege, is fraudulent; that the consideration is fictitious, and if not fictitious, is void, being an attempt on the part of Hays, who was insolvent, to give an undue preference to Burroughs, as a creditor, and therefore a nullity. Several other creditors of Hays intervened in the suit, but the case only presents the controversy between the plaintiffs and intervenor.

The evidence shows Hays was insolvent, that about noon the sale was passed and the intervenor entered into possession. Hays absconded immediately and the attachment was executed a few hours after. The intervenor offered no other evidence of the validity of the consideration mentioned in the notarial act, than its recitals and his own statements when he took possession of the store. He offered several witnesses to prove he was not entirely unknown. One represents him as a man

who "trades in most anything," but from the statements of them altogether, it appears his operations had been previously confined to speculations in shoes, tinware, lumber and wood in flat boats. They say he pays his debts, when he owes any, and one witness has known him to be worth money.

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The question is one of fraud; the judge who tried the cause saw and heard all the witnesses; he decided the sale was "made in fraud of Hays' creditors," and with a view to protect his property from their claims. We have examined the evidence and believe his judgment correct.

A sale of a stock of goods, although by notarial act, when shown to be in fraud of creditors, will not exempt them, even in the vendee's possession from *bona fide* attaching creditors of the vendor.

The judgment of the Commercial Court is therefore affirmed with costs.

BERNARD'S HEIRS vs. SOULÉ.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The husband and wife made a joint Will, and instituted each other sole and universal heir in case there was no children; with a proviso, that at the death of the survivor, any property or effects remaining should go to *their* heirs as legacies, in certain proportions: *Held*, that the wife *as the survivor* became the absolute owner of all their property and could alienate it. But if any remained unsold at her death, it went to both *their heirs*.

The rights of the heirs of either of the spouses, did not vest on the death of one of them, and could not until the *decease of the survivor*; they acquired only an eventual right or hope.

This is an action by the descendants of the brothers and sisters of André Bernard, living in France, who sue as his heirs and legal representatives to recover a lot of ground situated in Chartres street, New Orleans, and in the possession of the defendant, who claims it as owner.

The petitioners allege that a short time previous to the death

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of Bernard (in 1790,) he and his wife, Marie Françoise Robert, made their joint and reciprocal will, whereby they mutually bequeathed, in case of having no offspring, the whole of their estate to the one who should survive the other; with a proviso that after the death of the survivor, two thirds of the estate should go to the brothers and sisters of the said André Bernard; that he died in 1790 and his surviving widow took sole possession of all his estate, which she afterwards sold, and among this property was the lot of ground now claimed. They allege that she is dead and the property descends to them. They pray that they be decreed owners thereof, in virtue of the said Will, giving it to them at the death of the surviving spouse, &c.

The defendant claims the premises under a sale made by the Court of Probates of the estate of François B. Pacquelet, to whom it had been sold by the surviving widow of André Bernard in 1828. After her death, in 1834, this suit was instituted.

The plaintiffs claim under the joint Will of Bernard and wife, giving the whole of their estate to the survivor; with a proviso, that at the survivor's death, one third part of the property *which may be in existence at that period*, should descend as a legacy to the nephews of the wife, and the remaining two thirds to the brothers and sisters of the husband. The plaintiffs claim on the ground that the survivor had no authority to alienate the property, but only to enjoy, and at his or her decease it should be inherited in legacies as above claimed.

On these issues and grounds the cause was tried.

The district judge was of opinion the surviving wife, under the Will, had the power to alienate any of the property which she received under it. There was judgment for the defendant and the plaintiffs appealed.

C. M. Conrad & Dennis, for the plaintiffs and appellants.

Soulé in *propria persona* and appellee.

Morphy, J. delivered the opinion of the court.

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April, 1841.

The plaintiffs assert title to a piece of property in the possession of defendant, under a joint and reciprocal will or testament of their ancestor, André Bernard, and his wife Marie Francisca Robert, bearing date the 13th September, 1790. By this will they institute each other sole and universal heir, with the proviso, that in the event of their having any children, this mutual disposition shall become null and void. They further provide, that at the period of the death of the survivor thus instituted, one third of such property as may then exist, shall go, by way of legacy, to certain persons therein named, the relations of the wife; and they make a similar disposition on the happening of the same contingency of the remaining two thirds of the property in favor of the persons under whom the present plaintiffs claim; they being the brothers and sisters of the husband.

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The record shows that André Bernard died the same year this will was made; and his widow died in 1834. The latter on the 4th of March 1828, sold the property in dispute to Pacquelet, at whose death in 1832, it was purchased by defendant at a probate sale of his estate.

The clauses in the will, which give rise to this controversy, are in the following words, to wit:

“Y del remanente de nuestro bienes, dendas, &c., nos nombramos el uno por otro por unico y universal heredero para que el que sobreviviere de nos lo goce con la bendicion de Dios Y para en el caso de que se diserelva el matrimonio por muerte de alguno de nos sin tener hijos, queremos y es nuestra ultima voluntad que valga este como nuestra final disposicion, mutua, reciproca, &c. Con el buen entendido que por muerto del sobreviviente la tercera parte de los bienes *que hubiere existentes en aquella epoca, se le apliquen* porvia de legado que *desde ahora* mutuamente le hacemos á Don Nicolas, Don Bartholomé, Don Fernando, y Doña Maria Durochée.

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"Desde ahora para quando fallesca el sabreviviente de nos, legamos y donamos á Doña Maria Juana, Doña Catalina, Doña Magdelina, Doña Isabel y Doña Margarita Bernard, las dospartes de nuestros bienes," &c.

It is contended, on the part of plaintiffs, that this will contains a substitution which was permitted by the laws of the country in force at the death of André Bernard; that it conferred on their ancestors rights, which no subsequent legislation could affect; that although the survivor of the two spouses, Mrs. Bernard was instituted universal heir, she had only the usufruct or enjoyment of the property bequeathed; had no right to alienate it, but was bound to keep and transmit it to them; and this they say is the only construction which can satisfy the rule which requires effect to be given, if possible, to every part of a deed.

The construction appears to us at variance with the very terms of the instrument. From its whole context, it is clear that the intention of the two testators was to make in favor of each other the same disposition and bequest, and to place their respective heirs on the same footing. The expressions *de los bienes que hubiere existentes en aquella epoca*, although not repeated in the last clause, apply, in our opinion, to the two thirds of the property bequeathed to the relations of the husband, as well as to the third bequeathed to those of the wife. They leave no doubt in our minds that on the death of André Bernard, his widow became, as his universal heir, the absolute owner of the estate. She was not burdened with the obligation to keep and deliver it over to the persons named in the will; she had the free and absolute control of it, but if any part of it remained undisposed of at her death, then it was to have been divided according to the will; although the power to alienate is not expressly given, it can fairly be deduced from the above mentioned expressions in the will, coupled with the absence of any obligation or charge to preserve for and return the estate to the substituted heirs. This obligation or charge which limits the otherwise

The husband and wife made a joint Will, and instituted each other sole and universal heir in case there was no children; with a proviso, that at the death of the survivor any of the property or effects remaining should go to their heirs, as legacies in certain proportions: *Held*, that the wife, as the survivor, became the absolute owner of all their property and could alienate it. But if any remained unsold at her death it went to both their heirs.

absolute ownership of an universal heir, is one of the essentials which characterize an ordinary gradual substitution. This will contains, we think, a disposition well known to the former laws of the country as the *fidei commissum cum liberâ*, or *fidei commissum de eo quod supererit*. Touillier informs us that dispositions of this kind were very frequent between man and wife in some parts of France; and do not in his opinion come within the purview of Article 896 of the Napoleon Code which abolishes substitutions, &c., *fidei commissâ*, in nearly the same terms as Article 1507 of the Louisiana Code. Upon the whole it appears to us that the joint testators intended to prefer each other to all other persons and to divide whatever property might be left at the death of the survivor among their respective heirs.

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BERNARD'S
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SOULR.

The rights of the heirs of either of the spouses, did not vest on the death of one of them; and could not until the *decease of the survivor*; they acquired only an eventual right or hope.

But admitting, as it is contended, that this will contains a gradual substitution binding on the survivor by the law in force in 1790, we do not think that it would strengthen the case of the plaintiffs. The rights of the persons under whom they claim did not vest, as is supposed by their counsel, at the death of André Bernard; they acquired then only an eventual right, or rather a hope which did not descend to their heirs, the present plaintiffs.

Touillier, speaking of the rights of the substituted heirs which accrue only on the death of the *gravatus (grévê)* says :

“ Ils n'ont avant ce tems aucun droit formé sur les biens grévés de restitution mais une simple espérance qu'ils ne peuvent transmettre à leurs héritiers, &c.

“ La charge de rendre s'éteient si les appelés décèdent avant l'époque marquée pour la restitution or lorsqu'ils se trouvent à cette époque incapables de recueillir les biens.” 5 Touillier Nos. 737, 738, 739. A substitution then is opened in favor of the substituted persons only by the death of the *gravatus*; until that event takes place, they acquire nothing which can be considered as a right or property in them; *substitutio quæ non dùm competit extrâ nostra bona est*, (*Law 42, D: de*

EASTERN DIS. *acquiendo rerum dominio,*) These plaintiffs are the children
April, 1841. and grand children of the persons named in the will who died
WHITNEY ET AL. long before widow Bernard. They cannot, therefore, exer-
vs. cise rights which never accrued to their ancestors. But even
LYON. had any of the latter been living in 1834, it may well be
questioned whether the Code of 1808, abolishing substitutions,
and *fidei commissa* did not do away with the rights of all sub-
stituted heirs, which had not actually vested at the date of its
promulgation. If from that time the plaintiffs' ancestors had
no longer the capacity to take under a substitution, the pro-
perty bequeathed remained in the hands of widow Bernard free
from all charge or obligation, if any had ever existed, and she
had the right of selling, as she did, in 1828. Merlin questions
de droit, vol. 15, page 50, et seq.; Jurisprudence du Code
Civil, vol. 4, page 16.

The judgment of the District Court is, therefore, affirmed
with costs.

WHITNEY ET AL. vs. LYON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The testimony of a witness, not objected to, will outweigh the statements of the
defendant in his account, so far as he charges the plaintiffs for the *amount* of
his salary ; but will be received as evidence of the credits he allows for money
received.

This is an action to recover from the defendant the sum of
\$244 80, for moneys overdrawn by him as clerk of the plain-
tiffs, over and above his salary, which they allege was only
\$1000 per year.

The defendant sets up an account against the plaintiffs,
charging them at the rate of \$125 per month for eight months,

amounting to \$1000; for which he prays judgment in recon-
vention. EASTERN DIS-
April, 1841.

On the trial, Harris, a clerk for plaintiffs, declared that the defendant had received \$911 46, which he knew as he was the cash book-keeper; and that the latter acknowledged it in an account which he rendered to the plaintiffs, which he (witness) produced; and in which he charges \$125 per month (or \$1000) and gives credit for \$911 46. Another clerk of plaintiffs swears that the defendant told him his salary was but \$1000 a year. WHITNEY ET AL.
vs.
LION.

The district judge was disposed to take the statement of the defendant, rendered to the plaintiffs, as containing the true account between them; especially as it was brought out in evidence by the plaintiffs' witness. Judgment was given in favor of the defendant for \$88 54, and the plaintiffs appealed.

Benjamin, for the plaintiffs and appellants.

Elwyn, contra.

Martin, J. delivered the opinion of the court.

The plaintiffs are appellants from a judgment which condemns them to pay a balance on a reconventional demand of the defendant.

This suit was instituted to recover the sum of \$244 80, for moneys which the plaintiffs allege were overdrawn and received by the defendant while in their employ as a clerk. He pleaded a general denial and reconvened, claiming one thousand dollars for eight months salary as levee and corresponding clerk of the plaintiffs; being at the rate of one hundred and twenty-five dollars per month.

On the trial the plaintiffs offered Harris, one of their clerks, as a witness who proved that the defendant told him his salary was only at the rate of one thousand dollars a year; and this witness produced the account which the defendant had rendered to the plaintiffs, in which he charged his salary at one hundred and twenty-five dollars per month for eight months, and gave

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WHITNEY ET AL.
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LYON.

The testimony of a witness, not objected to, will outweigh the statements of the defendant in his account, so far as he charges the plaintiffs for the amount of his salary; but will be received as evidence of the credits he allows for money received.

credit for \$911 46, which he had received; striking a balance of \$88 54 in his favor. The district judge received this account as full evidence of what it contained on both sides, and gave judgment accordingly; notwithstanding the testimony of the plaintiffs' witness which was received without any objection,

and showed that the defendant acknowledged he agreed to serve on a salary at the rate of one thousand dollars a year, instead of one hundred and twenty-five dollars per month, as charged in his account. This testimony not being objected to it is useless to enquire whether its admission could have been successfully resisted in contradiction of the written evidence under the defendant's own hand, produced by the plaintiffs.

The judge *a quo* in our opinion ought to have considered this testimony and weighed it with the written evidence. This we have done, and find that the testimony of the witness preponderates over the written evidence resulting from the account.

The defendant acknowledges in his account to have received moneys of the plaintiffs amounting to \$911 46 cents; and after deducting the amount due to him for his salary, during eight months, at the rate of one thousand dollars a year, amounting to \$666 67, there remains a balance due to the plaintiffs of \$244 79, and for which they are entitled to judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion ought to have been given in the court below, it is ordered, adjudged and decreed that the plaintiffs do recover of the defendant, the sum of two hundred and forty-four dollars and seventy-nine cents; and that there be judgment against him on his plea in reconvention; he paying costs in both courts.

TISSOTT ET AL. vs. BOWLES.

EASTERN Dis.
April, 1841.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

TISSOTT ET AL.
vs.
BOWLES.

A plea denying the consideration, requires the plaintiffs to prove it; but if there be also a plea of failure of consideration, the party himself must show it.

This is an action on a promissory note.

The defendant admitted his signature, but averred the note was given for goods unmerchantable, and that the consideration had failed.

A supplemental petition was filed; to which the defendant replied, that he admitted his signature but denied all consideration.

There was judgment against him and he appealed.

Duvignaud, for plaintiffs.

Potts, contra.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment on his promissory note. He excepted to the petition on the ground that the first names of the plaintiffs were not set forth; and in answer admitted his signature but averred that the note sued on was given for goods and merchandize, wholly unmerchantable and that therefore there was *a failure* of consideration. The plaintiffs, with leave, amended their petition stating their first names. To this amended petition the defendant answered, that he admitted his signature but *denied all* consideration.

The second answer, if it stood alone, would have required the plaintiffs to prove the consideration for which the note was given; but the first one, in our opinion, relieves them from this burthen. It states that the consideration of the note was a quantity of goods, sold by the plaintiffs to the defendant, which were averred to be unmerchantable. If they were so the defendant ought to have proved it. It was easy for him, when he discovered the quality, to have secured the necessary evidence to establish it. The plaintiffs may have sold him the

A plea denying the consideration, requires the plaintiffs to prove it; but if there be also a plea of failure of consideration the party himself must show it.

EASTERN DIS. goods in boxes or packages which they had not opened.
April, 1841. There being no evidence of the quality of the goods, judgment was correctly given for the amount of the plaintiffs' demand.
TISSOTT ET AL.
vs.
BOWLES.

The defendant did not appear in the inferior court at the trial, which is a strong presumption that he had no defence; and that this appeal is frivolous and taken for delay alone.

It is therefore ordered, adjudged and decreed that the judgment of the City Court be affirmed with ten per cent. damages and costs in both courts.

TISSOTT ET AL. vs. BOWLES.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

An appeal from a judgment not signed, will be dismissed.

This is an action against the maker of a promissory note.

The defendant admitted his signature but averred the consideration had wholly failed.

There was no attempt to support the defence by proof, and judgment was rendered in favor of the plaintiffs; but from the record it does not appear to have been signed by the judge.

The defendant appealed.

Duvignaud, for the plaintiffs.

Potts, contra.

Morphy, J. delivered the opinion of the court.

The appellant has submitted his case on one point, to wit: that there was no legal judgment below against him; by

turning to the record, the judgment appealed from, does not appear to have been signed. If such be the fact the only legal consequence which flows from it, is that this appeal must be dismissed; Code of Practice, 546; 7 La. Rep. 518, Wright vs. M'Nair et al.

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April, 1841.

M'CABE
vs.
GENTES.

It is therefore dismissed with costs.

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M'CABE vs. GENTES.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Costs, awarded on leave to amend the pleadings, are not required to be paid up before the suit proceeds, as in case of non-suit or discontinuance.

Damages for a frivolous appeal, will not be given, when it does not appear the party has suffered any from the delay.

This case commenced by an order of seizure and sale, on a mortgage retained for the price of a slave, evidenced by the defendant's note.

The defendant took a rule to set aside the proceedings, on the ground that no copy of the petition in the French language had been served on him which was his vernacular tongue. On the trial the plaintiff obtained leave to amend in this respect, on payment of costs up to this time. He was proceeding with his seizure, when he was arrested by a second rule, to have the order of seizure set aside on the ground that the *costs of the amendment* had not been paid. This rule was discharged and the defendant appealed.

M'Millen, for the plaintiff, prayed that the judgment discharging the rule, be affirmed with ten per cent. damages.

Defendant P. P.

Morphy, J. delivered the opinion of the court.

EASTERN DIS.
April, 1841.

M'CABE
vs.
GENTES.

The plaintiff sued out an order of seizure and sale of a slave belonging to defendant, on an act importing a confession of judgment. The latter took on him a rule to show cause why it should not be set aside on the ground that the petition had not been served on him in the French language, his mother tongue. The judge made the rule absolute, but with leave to plaintiff to amend his petition by filing a copy of it in French, and upon his paying costs up to the time of the amendment. The petition in French having been filed and service thereof having been accepted by defendant, a few days after, he took another rule to set aside the order of seizure and sale on the ground that plaintiff had not paid the costs which he had previously been decreed to pay, and that no further proceedings could be had in the suit. This rule being discharged, the defendant appealed.

Costs, awarded on leave to amend the pleadings, are not required to be paid up, before the suit proceeds, as in case of non-suit or discontinuance.

The Judge decided correctly; the proceedings instituted by plaintiff had not been discontinued nor had he been non-suited; on the contrary he had obtained leave to amend, which he did with a view to proceed with his case; C. of Pr., arts. 492, 535.—7 La. Rep., 413. The appellee has prayed for damages for the frivolous appeal. We would not hesitate to allow them, were it not that on examining the authentic act annexed to the petition, we find in it a stipulation by which the slave mortgaged is to remain in the possession of the plaintiff, with the right to enjoy his hire and services for the use of the money loaned to defendant, to wit: \$400; the amount of the note sued on; until the same shall be paid. This accounts for the extraordinary forbearance of the plaintiff who brought suit only in April, 1839, although defendant's note fell due in August, 1836. Under such circumstances, and when plaintiff is already receiving much more than the highest rate of conventional interest, we cannot say that he has suffered any damages by the delay consequent on the appeal.

Damages for a frivolous appeal, will not be given, when it does not appear the party has suffered any from the delay.

The judgment of the District Court is therefore affirmed with costs.

TAIT vs. DE ENDE'S Executors.

EASTERN DIS.
April, 1841.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY
OF NEW ORLEANS.**

**TAIT
vs.
DE ENDE'S EX'RS**

The recitals of the evidence given in the opinion of the Judge who tries the case, is not sufficient. This court must have the evidence itself.

A copy of a naked judgment may be admissible in evidence, but not sufficient to make proof of the matters contained in it.

The whole of the record must accompany the judgment of a foreign tribunal, to give it effect in our courts.

This is an action on a judgment rendered in Virginia against the estate of Henry De Ende, who died during the pendency of said suit. Final judgment having been rendered against the sheriff as administrator representing the deceased, in that State, in favor of the plaintiff for \$3761, he sued the executors of De Ende, in this State, alleging they had assets, effects, or property of the deceased sufficient to pay his demand. He prays that J. L. Lewis, the surviving executor, and the representatives of Philip Power, and J. M'Kinney, deceased, also executors of De Ende, be cited and condemned to pay the amount of his demand.

The defendants pleaded the general issue, and aver that they had paid over the funds, or nearly all, to the heirs, long before the institution of this suit, and pray to be dismissed.

Upon these pleadings and issues the parties went to trial.

The only evidence offered at the trial was the judgment of the Superior Court of Law and Chancery of Virginia, decreeing the plaintiff the sum he claims. The defendants' counsel objected, on the ground that the executors or heirs of De Ende were not parties to it; that the acts of the administrator in Virginia, were not binding on the executors here, and that the Probate Court is without jurisdiction, the heirs having been put in possession of the estate of the deceased; the objections were sustained and the judgment rejected as evidence. The plaintiff took his bill of exceptions.

There was judgment of non-suit and the plaintiff appealed.

EASTERN DIS.
April, 1841.

TAIT
vs.
DE ENDE'S EX'RS

Strawbridge, for the plaintiff.

Roselius, contra.

Garland, J. delivered the opinion of the court.

This action is brought against Lewis the surviving executor of the late Henry De Ende, and the representatives of J. McKinney and Philip Power, both deceased, who were also executors in their lifetime, praying that a judgment which was rendered in favor of the plaintiff against the administrator of De Ende in the Superior Court of Law and Chancery for the county of Henrico in Virginia, for \$3761 85, with interest at six per cent. per annum, from the 31st of March in the year 1831, until paid, be declared executory against them and they ordered to pay the amount as a privileged debt, there being a considerable sum of money in his hands or in those of the representatives of the deceased executors, and property belonging to the succession yet unsold. Only Lewis and the widow of Power were cited. They filed a general denial, and further, "that they have paid over to the heirs of their testator all or nearly all the funds that have come to their hands as executors, and that long before the institution of this suit." They pray to be dismissed and for general relief. There is no allegation or exception in this answer to the jurisdiction of the court, or that the executors have rendered an account, delivered the succession over to the heirs and been discharged by authority of the Court of Probates. It simply says that they have paid the heirs all or nearly all the funds, which would seem to imply that no settlement had taken place.

On the trial the plaintiff offered in evidence a copy of the judgment rendered in Virginia, without any portion of the previous proceedings in the case, to the introduction of which the counsel for the defendants objected, on the ground that neither the executors or heirs of De Ende were parties thereto. That the acts of the administrator in Virginia could not bind the executors or the heirs here. That the court was

without jurisdiction; the heirs having been put in possession as appears by a judgment to that effect. The evidence was rejected, the plaintiff non-suited and he took an appeal.

EASTERN DIS.
April, 1841.

TAIT
vs.

DE ENDE'S EX'RS

The court below rejected the document on the grounds that the defendants were *functi officio* as regards creditors; that the court had no jurisdiction to try the case, as the heirs had been recognized and put in possession of the succession, as appeared by a final decree of the Court of Probates. It is a complete answer to these objections to state, that they all assume facts which are not in the record, or alleged in the answer. The judge has probably stated the facts correctly and acted on his own knowledge, but we have repeatedly said that the recitals of the evidence given in a case, in the opinion of the judge who tries it, is not sufficient for us to act on; we must have the evidence itself; particularly in a case where there are no such grounds of defence alleged in the answer as are assumed. It was rather too late to interpose a plea to the jurisdiction of the court by way of objection to evidence, after an answer to the merits, and at last not offer any evidence to sustain the plea of the want of jurisdiction. The grounds taken by the Judge of Probates for rejecting the evidence are, properly speaking, pleas or exceptions which the defendants might have made to the action.

The recitals of the evidence given in the opinion of the judge who tries the case, is not sufficient. This court must have the evidence itself.

The objections that neither the executors in this State, nor the heirs of De Ende were parties to the suit in Virginia, and that the acts of the administrator there, does not bind the executors or heirs here, are, in our opinion, objections that go more to the effect of the document offered than to its admissibility. Whether it is conclusive on the executors and heirs, is a legal consequence resulting from the act itself, and involves the whole question. We therefore think the copy of the judgment ought to have been admitted as evidence. The document has come up with the record, and we can decide whether it will of itself support the claim of the plaintiff. We think it does not. It is only a portion of a record, the whole of which ought to be produced so that we may judge whether the judgment is conclu-

A copy of a naked judgment may be admissible in evidence but not sufficient to make proof of the matters contained in it.

EASTERN DIS. sive or not. If De Ende had never been cited or appeared
April, 1841. and filed an answer previous to his death, nor have been
VERRET ET AL. properly represented after, we have no hesitation in saying the
vs. judgment would not bind his heirs or executors here. We
CLAVE.

The whole of cannot, in the proceedings of a foreign tribunal, take for
the record must granted that every thing in them is correct, and blindly bind
accompany the our citizens by its judgment, without knowing whether it had
judgment of a jurisdiction, or is right or wrong. In the case of Patterson vs.
foreign tribu- Mayfield's curator—10 La. Rep., 220—and that of Warren vs.
nal, to give it Hall's executor, &c.—ibid, 377—the questions under conside-
effect in our ration were argued at much length and the decisions have a
courts. strong bearing on this case.

By a process of reasoning widely different from that of the
Probate Judge we arrive at the conclusion, that the non-suit
was properly entered, and affirm the judgment with costs,

VERRET ET AL. vs. CLAVE,

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

Appeal solely for delay, and judgment affirmed with the maximum of damages.

This is an action against the maker of a promissory note, to
which there was no defence.

Final judgment was rendered on the plaintiff's showing.
The defendant appealed.

Grandmont, for the plaintiff.

Preau, contra.

Garland, J. delivered the opinion of the court.

This is a suit on a promissory note ; the defendant permitted

a judgment by default to be taken and made final, and took an appeal. He has not stated any reason why the judgment should be reversed, we therefore consider it as an appeal taken solely for delay; and order, and decree, that the judgment of the court be affirmed with costs, and ten per cent. damages.

EASTERN DIST.
April, 1841.

TURNER
&
RENSHAW
vs.

WHEATON ET AL.

TURNER & RENSCHAW vs. WHEATON ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The exclusion of warranty in a sale, does not absolve a vendor from the obligation of disclosing the redhibitory vices not apparent.

Where the seller failed to inform the buyer that the slave was a runaway, it was held sufficient to rescind the sale, although sold without any warranty except as to title.

This is an action against the maker and endorser of a promissory note for \$228 75, and interest.

Wheaton, the maker of the note admits his signature, but avers it was given in part and for the price of a slave which he purchased from the plaintiffs for the sum of \$610. He further states that he paid part cash and gave his two notes, (the first of which is now sued on) for the price. That at the time he purchased said slave she was a thief and runaway, which was known to plaintiffs and withheld from him; and that she is worthless and of such notorious bad character that had he known it, he would not have purchased her. He avers he has tendered her to the plaintiffs and demanded a return of the price, which they have refused. He therefore prays judgment in reconvention for a rescission of the sale, the return of the amount he has paid, and that his notes be given up.

The case was tried on this issue. It turned mainly on the

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testimony relating to the redhibitory vices set up in the reconventional demand. The plaintiffs rested their case, principally on the ground that they sold without warranty, except the title, and are not liable for any redhibitory vices; and further that the evidence does not show such a habit of running away as to materially affect the character of the slave; and the allegation that she was a thief is not proved.

The district judge was however of opinion both allegations of defendant, Wheaton, in his reconventional demand were proved, and that the redhibitory vices complained of existed to the knowledge of the plaintiffs at the time of the sale, and were concealed from the purchaser. There was judgment against the plaintiffs, and in favor of the defendants, allowing the reconventional demand. The plaintiffs appealed.

C. M. Jones, for the plaintiffs.

Durant, for the defendant:

1. There is no error in the judgment of the court below, the same being fully supported by the evidence and the law applicable to the case.

2. It is clearly shown by the proof that the slave was a thief and a runaway to the knowledge of vendors at the time of sale and that they concealed these facts from vendee.

3. A guaranty of title only in the sale, cannot absolve the vendor from the obligation of disclosing the vices, not apparent, which he knows to exist.

Morphy, J. delivered the opinion of the court.

The defendants being sued as the drawer and endorser of a note of hand; Wheaton, the drawer, pleaded in answer and reconvention that the note had been given by him in part payment of the price of a negro woman purchased of plaintiffs. That the slave was a notorious thief and runaway, to the knowledge of the vendors, who concealed the fact, instead of declaring it, as they were bound to do. There was a judg-

ment below rescinding the sale and decreeing the reimbursement of such part of the price as had been paid.

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It appears from the record that the slave was warranted only as to title, but not as to the vices and maladies provided against by law. This court has always held that the exclusion of warranty in a sale does not absolve a vendor from the obligation of disclosing the vices, not apparent, which he knows to exist.—6 M. R. p. 699—7 M. R. 33.—La. Code, art. 2526. As to the evidence it satisfies us, as it did the Judge below, of the existence of the vices complained of; and of plaintiff's knowledge, of at least one of them. The circumstance of their vendor testifying that when he informed them that the slave was a runaway, he told them at the same time where she would probably go, cannot assist plaintiffs. Had they made the same communication to Wheaton, he would not perhaps have made the purchase. The same witness informs us that whenever she ran away from plaintiffs she did not come directly to his house; that he understood from plaintiffs on those occasions that she had been absent two or three days before she was found at his house. The testimony of several other witnesses shows that her bad habit began long before the sale, and continued while she was in the possession of defendants. One of the witnesses represents her as such a worthless creature that he would not take her as a gift, with the obligation of keeping her six months.

The exclusion of warranty in a sale, does not absolve a vendor from the obligation of disclosing the redhibitory vices not apparent.

Where the seller failed to inform the buyer that the slave was a runaway, it was held sufficient to rescind the sale, altho' sold without any warranty except as to title.

The judgment of the District Court is therefore affirmed with costs.

CASES IN THE SUPREME COURT

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April, 1841.

VARION *vs.* DEBERGUE.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

VARION
vs.
DEBERGUE.

Judgment amended for allowing five, instead of 4 per cent. interest; and for want of amicable demand, the appellee paying costs in both courts, after the appearance of the defendant.

This is a suit by the endorsee of a note, against the maker. The note is for \$600, payable in two years from the 29th June 1837, with *four* per cent. interest.

The defendant pleaded several matters in defence; and among them, the want of amicable demand.

There was judgment in favor of the plaintiff, for the amount of the note, with *five per cent.* interest, and the defendant appealed.

R. Hunt, for the plaintiff.

Bodin, contra.

Morphy, J. delivered the opinion of the court.

This is a suit brought by the endorsee of a note of hand drawn by defendant on the 29th of June, 1837, and made payable two years after its date, with interest at the rate of four per cent. per annum. There was judgment below for plaintiff and defendant appealed.

On examining the record, we find that the judge below allowed five per cent. per annum on the debt instead of four, which is stipulated in the note sued on, and prayed for in the petition; moreover it exhibits no proof of amicable demand, although the want of it is specially pleaded.

It is, therefore, ordered that the judgment of the Commercial Court be so amended as to decree defendant to pay only four per cent. per annum, instead of five, on the amount of the note, and the costs made below after the first appearance of defendant, inclusively; the remaining costs in that court and those of this appeal to be paid by the plaintiff and appellee.

McMANUS vs. WEST.—ODOM, Intervenor.EASTERN Dis.
April, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

McMANUS
vs.
WEST.

On the suggestion of the death of the plaintiff, during the pendency of the suit in a court of ordinary and general jurisdiction, it has no power to appoint a curator to represent his heirs.

This suit commenced by attachment. The defendant, West, is sued on his promissory note, and property attached in the hands of garnishees. A curator *ad hoc* was appointed to represent the absent defendant who pleaded a general denial. The garnishees answered, they had nothing in their hands belonging to West, at or since the service of the attachment; but that they had received 229 bales of cotton from him, 125 bales of which were sold before the attachment, and the remaining 104 bales they were directed to hold subject to the order of Benjamin Odom, which has been sold by his order and the proceeds remain in their hands to his credit.

Odom now intervened and claimed the proceeds of this property.

After the cause was thus at issue, on the suggestion of the counsel for the intervenor, that the plaintiff had departed this life, it was ordered that I. W. Smith, Esq., be appointed *curator ad hoc* to represent the heirs of said plaintiff.

In this manner the cause proceeded. The plaintiff had judgment for the amount of his demand against the defendant, and that the property attached be applied in satisfaction; dismissing the petition in intervention. The intervenor appealed.

Peyton & Smith, for the plaintiff.

Chinn, for the intervenor and appellant.

Martin, J. delivered the opinion of the court.

During the progress of this suit the counsel of the intervening party and appellant suggested the death of the plaintiff, and on his motion the court appointed a curator to the heirs of

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April, 1841.

ARNOUS
vs.
DAVERN ET AL.

the deceased. The court then proceeded to judgment and decreed that the plaintiff, M'Manus, recover from the defendant the amount of the note sued on, and that the property which had been attached be sold to satisfy the same; and dismissed the petition of intervention. The intervenor alone appealed; and cited both plaintiff and defendant.

As the plaintiff's death was suggested, and not being denied it must be taken as true. It however does not justify the appointment of a curator to his heirs. If they were within the State no curator could be appointed to them; and if absent, the Court of Probates possesses the exclusive power to make the appointment; Code of Practice, art. 924, No. 4. The appointment being irregular, all the posterior proceedings contradictorily with him are equally so.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be annulled, avoided and reversed; the appointment of the curator set aside; and the case remanded for further proceedings, commencing in the situation it was at the time the suggestion of plaintiff's death was made. The plaintiff and appellee paying the costs of the appeal.

ARNOUS vs. DAVERN ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Parol evidence is inadmissible to prove any thing that was said or understood inconsistent with a written act; or any contract between the last purchasers and their immediate vendor, against the first vendor who is not privy to such contract.

The last purchasers or vendees, who assume the notes of their immediate vendor to his, or the original vendor, cannot resist payment on the ground of any equities or conditions existing between them and their immediate vendor. The plaintiff or original vendor is a stranger to them.

This is an hypothecary action of six promissory notes executed by H. Lockett, payable to the order of F. Frey & Co., amounting to \$3900 with interest, given as the price of certain city lots, with mortgage in favor of the plaintiff, the original vendor, *and assumed* by the defendants as the vendees of Lockett. Judgment is prayed against them with mortgage and privilege on the lots of ground.

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The defendants denied their liability to pay the notes sued on, because the consideration, they allege, for which they assumed their payment has failed, inasmuch as it was represented at the time they purchased from Lockett, that St. Johns street, upon which the lots are situated, would be opened immediately, and upon that consideration alone they purchased; that they have been deceived and led into error; the said street not having been opened, which was the only inducement to purchase the lots at the high price they consented to give for them. They pray that the plaintiff's petition be dismissed.

Upon these pleadings and issues the parties went to trial.

The evidence consisted principally of the acts of sale of the lots in question from the plaintiff to H. Lockett, Esq., and from him to the defendants, in which they assume the payment of his notes to the plaintiff. On the trial, the Deputy City Surveyor was produced by the defendants as a witness, and a question propounded by them for him to state at what time St. John street was opened, &c.; to which the plaintiff's counsel objected on the ground that the act of sale in which the defendants assumed the payment of the notes contained no condition as to the opening of St. John street, and it was not competent to form such condition by parol evidence. The witness was also asked if in 1836 St. John street was not closed? which was also objected to. All the objections were overruled, and the evidence admitted by the Judge with the remark that the *plan* was part of the act, and the testimony only explains its connexion with and bearing on the contract.

There was a verdict and judgment for the plaintiffs, after deducting \$750 from the demand for damages suffered in not

EASTERN DIS. opening St. John street, as expected by the defendants. The
April, 1841. defendants appealed.

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Lockett & Micou, for the plaintiff, asked that the judgment be so amended as to allow the entire amount of the notes claimed.

Preston & Larue, contra.

Bullard, J. delivered the opinion of the court.

The defendants are sued upon four promissory notes, amounting to three thousand nine hundred dollars, drawn by H. Lockett in favor of the plaintiff, but which the defendants assumed and engaged to pay as part of the price of certain City Lots purchased by them of Lockett, and which he had previously bought of the plaintiff. The lots sold to the defendants by Lockett are described to be "joining each other, situated in the suburb St. Mary, designated by Nos. 19, 20, 21 and 22, in the square bounded by Circus, Girod, St. John, and Julia streets, agreeably to a plan drawn by L. J. Pilié, deputy surveyor general," and which plan is identified with the act. The lots are further described as fronting on St. John street. On looking at the plan it appears that a black line runs across St. John street, as if it had not yet been entirely opened *at* the time of the sale.

The defence set up is that the consideration for which the respondents assumed to pay has failed, inasmuch as it was represented to them at the time they purchased the lots from H. Lockett, that St. John street upon which the lots are situated would be opened immediately, and upon that consideration alone they were induced to make the purchase.—But they aver that they were deceived and led into error, and that the street is not yet opened. They conclude by praying to be dismissed with costs.

The case was submitted to a jury who found a verdict of \$3150, "being of opinion that \$750 should be deducted from

the notes sued upon for damages suffered by defendants for the reasons set up in their defence.”

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Our attention is first called to a bill of exceptions by which it appears, that a witness called by the defendants was asked to state at what time St. John street was opened, which question and every answer thereto were objected to because the act by which the defendants assumed to pay the notes sued on contains no condition as to the opening of said street, and it is not competent for the defendants to form such a condition by parol evidence. The same witness was further examined to prove that in 1836 St. John street between Girod and Julia streets was closed, which evidence was objected to for the same reason. But the evidence was admitted on the ground that the plan forms a part of the act and the testimony only explains its connexion with and bearing on the contract.

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We are of opinion that the court erred in going into any inquiry as to the opening of the street. In addition to the obvious objection, that the contract makes no mention of the opening of a street, and that parol evidence is inadmissible either against or beyond what is mentioned in a written act, and as to what may have been said before or at the time of making it or since, there is no privity of contract between the defendants and the present plaintiff. Their warrantor is Lockett; and even if they had been evicted of the property, they could have had no recourse on the present plaintiff—nothing shows that he was responsible even to his vendee that the street would be opened within a given time; nor is there any subrogation of such warranty. The plaintiff must therefore be regarded as a stranger to the contract, and as to him the question is, whether he be not entitled to recover on the promise and stipulation of the defendants without regard to any equities, which might exist between them and their immediate vendor, even supposing him to be responsible for the delay in opening the street. If instead of assuming to pay Lockett's notes due at a future day, the defendants had given their own notes payable to the order of their vendor at the

Parol evidence is inadmissible to prove any thing that was said or understood inconsistent with a written act; or any contract between the last purchasers and their immediate vendor, against the first vendor who is not privy to such contract.

The last purchasers or vendees who assume the notes of their immediate vendor to his, or the original vendor, cannot resist payment on the ground of any equities or conditions existing between them and their immediate vendor.—The plaintiff or original vendor is a stranger to them.

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vs.
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&
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same periods, and they had come into the hands of the plaintiff as endorsee without notice of any latent equity between the original parties, we are of opinion he would have been entitled to recover. How is the case varied when the engagement is made directly with the present plaintiff by whom the stipulation is accepted, especially when the promise forms a part of a contract in which nothing is said about the opening of a street within a given time?

The defendants have therefore entirely failed, in our opinion, in making out their defence, and we do not consider it important to inquire whether the charge of the court to the jury was correct or not.

It is therefore ordered and decreed that the judgment of the Commercial Court be avoided and reversed, and the verdict set aside, and proceeding to render such judgment as ought in our opinion to have been given below, it is further ordered that the plaintiff recover of the defendants three thousand nine hundred dollars, with interest at five per cent. upon \$1300, from the 8th of September, 1838, and upon \$2600 from the 7th September, 1839, with eight dollars costs of protests, together with the costs of both courts, and that the mortgaged premises be seized and sold to satisfy the same.

MOSELEY vs. KEYS & ROBERTS.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The authority of a clerk to sign the name of a mercantile firm to a letter of credit addressed to a particular person, when denied may be shown by circumstantial evidence, when there is no direct proof.

This is an action based on a letter of credit.

The plaintiff alleges that on the 4th April, 1839, B. A.

Gamble acting in the name and by the authority of the defendants, addressed a letter of credit by which they engaged to accept such drafts as Samuel Armistead might draw on their house between the first of December, 1839, and first of February, 1840, to the extent of \$2000. That on the 6th August, 1839, the said Samuel Armistead did draw his draft on said firm for \$2000, in favor of this petitioner, payable the 2d December following and delivered the same, which was presented for acceptance and afterwards for payment at maturity, and duly protested for non-acceptance and non-payment. He prays judgment for the amount thereof.

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The defendants denied that the letter of credit was written or signed by them or by Benjamin A. Gamble, or any other person by their authority. That they never accepted or promised to pay said draft and are not bound for the same.

Upon these pleadings and issues the parties proceeded to trial.

The case turned mainly on a question of fact, whether B. A. Gamble, then the clerk of the defendants had authority to write and sign the letter of credit under which the draft was drawn.

The Judge presiding at the trial was of opinion that the defendants were bound under the letter of credit to accept and pay the draft, and gave judgment for the plaintiff. The defendants appealed.

Peyton & Smith, for the plaintiff.

Vason, contra.

Bullard, J. delivered the opinion of the court.

The plaintiff alleges himself to be the holder of a bill of exchange drawn by Samuel Armistead upon the defendants in virtue of their letter of credit in favor of the latter, whereby they promised to accept any drafts drawn by him upon them not exceeding two thousand dollars, payable between the first of December, 1839, and the first of February, 1840, but which

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bill they refused to accept. The plaintiff alleges that the letter of credit was written by Benjamin A. Gamble, acting in the name and by the authority of the defendants. The defendants for answer say that the letter of credit described in the petition was not drawn nor subscribed by them nor by any person duly authorized by them, and that if it was drawn by Gamble he had no authority to subscribe their names thereto, and that they never accepted and were not legally bound to pay the draft sued on. There was a judgment for the plaintiff and the defendants appealed.

The case turns altogether upon a question of fact, to wit: the authority of Gamble to sign the name of the defendants to a letter of credit in favor of Samuel Armistead. The evidence appears to us perfectly satisfactory that the letter of credit was executed by their order. It is true that in the letter-book which was kept by Gamble the copy appears to be addressed to William Armistead, who is shown to be a responsible man, but the index referring to the copy has the name of Samuel Armistead, which corresponds with the original. Another strong circumstance is the fact shown in evidence that the defendants took collateral security from Samuel Armistead to guaranty them against their letter of credit. It is not shown that William Armistead had any dealings with the house. On the contrary Samuel Armistead had been in correspondence with them and they had made a purchase of cotton from him which was shipped to New York a few days after the date of the letter of credit. Gamble's character appears to have been above reproach. A letter written by him to the plaintiff from Ireland, which it was agreed should be read as a deposition in the event of a law suit, was properly used notwithstanding the defendant's objection to it, and particularly certain parts of it alleged to be impertinent and defamatory. He gives a full and fair explanation of the transaction, from which it is clearly shown not only that he was expressly authorized to sign the letter of credit to Samuel Armistead, but that it was done contrary to his advice, and that one of the partners expressed his regret afterwards at

having done so, and said jocosely that the only way of evading it was to charge him (Gamble) with forgery. Gamble expresses a just and manly indignation at the shuffling equivocation of the defendants, which was certainly calculated, after he had left the country, to leave a foul imputation upon his name.

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COMMERCIAL
BANK OF ROD-
NEY
vs.
HINDS.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs and ten per cent. damages.



COMMERCIAL BANK OF RODNEY vs. HINDS.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Judgment of the inferior court corrected and amended by consent of parties; being erroneous on its face, and the error only discovered after it became final.

The plaintiffs had judgment on attachment, against the defendant for the sum of \$2126 96, with interest, &c., and appealed. The statement of facts show that they claim \$2814, with interest; and allow a credit of \$440, leaving a balance of \$2374, without interest. It is admitted the latter sum is correct, and that the judgment should have been so rendered.

Rawle, for the plaintiffs.

McCaleb, curator *ad hoc*, representing the defendant.

Garland, J. delivered the opinion of the court.

This suit was commenced by attachment on two promissory notes. The plaintiffs had judgment for \$2126 96 with interest, and appealed, for the purpose as is alleged, of correcting an error in calculation which was discovered after the judg-

EASTERN DIS. ment was signed and became final. The error is apparent,
April, 1841. and the parties consent to its being corrected as appears by an
 agreement on file.

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DAVIS.

The judgment of the Commercial Court is therefore annulled, avoided and reversed, and this court proceeding to give such judgment as is admitted, ought to have been rendered in the court below, further orders and decrees, that the plaintiffs recover of the defendant the sum of two thousand three hundred seventy four dollars and eighty two cents, with interest at the rate of seven per centum per annum on the sum of eleven hundred and thirty three dollars and fifty cents, part thereof from the 8th day of October in the year 1838 until paid; and interest at the like rate on the remaining sum of twelve hundred and forty one dollars and twenty six cents from the 23rd. day of August in the year 1838 until paid, with costs in both Courts.

ROGERS vs. DAVIS.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Where the party takes his commission six months before trial to procure testimony and makes no effort, to obtain it, he has not used sufficient diligence to obtain a continuance.

The fear of eviction, or being disquieted in the possession of real property is no good reason to delay the payment of the price.

If the party knew of the incumbrance before he purchased, it is doubtful if he can even demand security when he fears eviction.

This is an action by the holder against the acceptor of a bill of exchange drawn and made payable at Portland in the state of Maine.

There were various circumstances set out in the defence to

show that the acceptor had received no consideration for the draft; that it was drawn and accepted under certain conditions known to the present holder, which were never fulfilled or complied with.

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DAVIS.

Interrogatories were propounded to the plaintiff touching his interest in and right to sue on this bill, which were ordered to be answered.

On the 18th April, 1840, a commission was taken out by defendant to procure the testimony of A. Clapp of Portland, the payee of the bill, to explain the circumstances under which it was drawn and the consideration; also the incumbrance on the property for which it was given. The commission was, it seems, never executed.

In November following a continuance was asked, until the testimony of nameless witnesses were taken, which was refused, and the defendant ruled to trial. He took his bill of exceptions.

There was judgment for the plaintiff and the defendant appealed.

Peyton & Smith, for the plaintiff.

Durell, for the defendant.

Garland, J. delivered the opinion of the court.

This is an action brought by the endorsee of a draft against the acceptor. The latter alleges the consideration of the bill was part of the price of a house and lot in Portland, Maine, sold by one Eben Steel to him, and that it was drawn, endorsed and accepted, under an agreement among all the parties, that there was a mortgage on the house and lot at the time, which was to be raised before the bill was paid, and as it has not been raised the consideration has failed. Interrogatories were propounded to the plaintiff as to his interest in the bill and the consideration of it. He answers that the bill was endorsed and given to him to collect and apply the proceeds to discharge a mortgage on the house and lot in favor of Clapp, the endor-

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ser. From these answers, the answer of the defendant to the petition and the affidavits made by him and his agent, it would appear that Clapp had a mortgage on the house and lot; the defendant purchased it, and to accommodate all parties, Bailey drew the draft in favor of Clapp, which was accepted to facilitate the arrangement, and if the defendant had paid the draft at maturity, we think it more than probable the mortgage would have been released, for the amount of it at least.

The defendant filed his answer in April, 1840, and on the same day asked for a commission to take testimony out of the State, which was granted. He made no effort to take the testimony. His interrogatories were answered early in May and it is presumed were soon after returned into the court below. The defendant took no other step to prepare his defence until late in October when he again asked for another commission to take testimony, but in it names no witnesses. The cause was fixed for trial on the 16th of November and five days before the day, he made an affidavit to obtain a continuance, which was offered by his counsel on the day of trial in support of a motion to that effect. The judge overruled the motion principally on the ground that sufficient diligence was not used to procure the testimony. We think he was correct. For more than six months after the defendant had filed his answer and had the authority of the court to procure testimony he made no effort to obtain it.

Where the party takes his commission six months before trial to procure testimony and makes no effort, to obtain it, he has not used sufficient diligence to obtain a continuance.

The fear of eviction, or being disquieted in the possession of real property is no good reason to delay the payment of the price.

If the party knew of the incumbrance before he purchased, it is doubtful if he can even demand security when he fears eviction.

But if he had the testimony as stated in his affidavit, it would not avail him. It has been long settled that a fear of eviction or being disquieted in the possession of real property is no reason to delay payment of the price; 3 La. Rep., 458, 490. The purchaser may, under the La. Code, art. 2535, demand security, but it is not asked in the answer in this case; and if it were, it is somewhat doubtful whether it would have been ordered, as the defendant knew of the incumbrance when he purchased; and we believe if he had have paid the price he promised, the incumbrance would to that extent have been released.

We think the law and equity of the case are against the defendant, and therefore affirm the judgment of the Commercial Court with ten per cent. damages and costs.

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GRAY
vs.
TIERNAN,
CUDDY & CO.

GRAY vs. TIERNAN, CUDDY & CO.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The purchase of house-hold furniture for the use of one of the partners, although occasionally used to entertain the customers of the firm, cannot come within the scope of the partnership.

A partnership is not bound for a note signed by one of the partners with the partnership name, and which is shown to have been given for the price of furniture for his individual use.

This is a suit by the payee and holder of a promissory note signed with the partnership name of the defendants.

Charles Tiernan, the liquidating partner of the defendants' firm pleaded a general denial and averred that the partnership was not in any way liable for the note in suit, because it was not given for the benefit of the concern, but was an individual transaction for the private benefit of one of the partners who then conducted the business of the firm. An interrogatory was propounded to the plaintiff by which it came out, that Cuddy, the resident partner gave the note in question for the price of house-hold furniture purchased from the plaintiff, and used the partnership name, although the furniture was for his own use.

Upon these pleadings and issues the question arose, was the partnership liable for the note?

The evidence showed that the note was entered on the books of the firm, to "house expenses;" that Cuddy was in

EASTERN DIS. the habit of taking their customers to his house to dine with
April, 1841. him, &c.

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The District Judge was of opinion the firm was bound for the note and gave judgment for the plaintiff.

The defendants appealed.

Maybin, for the plaintiff.

Strawbridge, contra.

Bullard, J. delivered the opinion of the court.

The question presented in this case is whether the note sued on, which was signed by one of the partners, in the name of the firm, be evidence of a partnership debt and binding upon the firm, either originally or in consequence of subsequent transactions. It was given to the plaintiff by Cuddy, one of the partners, for certain household furniture purchased by him for his own house, and who in the absence of Tiernan, his partner, who is now sought to be charged, entered it in the books of the firm under the head of "*house expenses*." It further appears that the furniture was used by the partner who had purchased it in his own house, and that he occasionally entertained the customers of the house, and that ultimately it was seized and sold under an execution to pay a debt of the partnership.

The purchase of household-furniture for the use of one of the partners, although occasionally used to entertain the customers of the firm, comes within the scope of authority conferred by the contract of partnership upon each member of a commercial firm; Gow, 57. The proof in the record that the purchase was made for the use of one partner, repels the presumption arising from the use of the partnership name, that the debt was one of the partnership in its origin. It remains to enquire whether it has become such, either by the entry in the books as above mentioned, or because the furniture was afterwards seized and sold to pay a debt of the firm.

The charge in the books under the head of "house expenses" without any proof that by the terms of the association each party was allowed to charge his expenses of that kind to the firm, and to what extent, and without such charge being known to the partner living abroad, does not in our opinion sufficiently show the liability of the firm. It is true, two experienced merchants have testified in the case, that in their opinion if a partner having the sole management of the concern should be at the expense of keeping house for the entertainment of the friends of the house who should visit the city, they would consider the expense a fair charge, if it were for the interest of the partnership, deducting a fair proportion for his own living. Admitting that such evidence is entitled to consideration upon a question of law, yet the case supposed by the witnesses does not appear parallel to this; and we are without the means of appreciating the advantage which a commercial concern might derive from the occasional entertainment of its customers, or of estimating the share which ought to be deducted for the expenses of the acting and resident party. But this case goes much further than that supposed by the witnesses. The firm is not charged with the expense of house-keeping but with the cost of the furniture used occasionally to accommodate the customers of the firm. By parity of reasoning why would not the house rent of the partner or the price or hire of his servants be a fair charge against the firm? The cases relied on by the counsel of the appellee from the 6 Martin, N. S., 48, and the 13 La. Rep. 193, do not appear to us to support him. In the first case the question was whether Dubuys & Longer were partners of Dupuy in relation to third persons who had dealt with Dupuy in his own name; and the court held that one partner binds the others when he purchases in his own name goods in which the partnership deals. In the case reported in the 13th La. Rep., 193, we held that a contract of lease by one partner, of premises *occupied by the firm*, is binding on it. None of these decisions militate against the principles recognized by this court in the following cases: 4 Mar-

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April, 1841.

GRAY
vs.
TIERNAN,
CUDDY & CO.

EASTERN Dis.
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GRAY
vs.
TIERNAN,
CUDDY & CO.

A partnership is not bound for a note signed by one of the partners with the partnership name, & which is shown to have been given for the price of furniture for his individual use.

tin, 377; 4 Martin, N. S., 347; 1 La. Rep., 28, and 10 idem, 416. But if the original purchase of the furniture was not within the scope of authority, resulting from the partnership, and no ratification can be inferred from the entry in the books by the partner himself in the absence of the one now sued, how is the case altered by the fact that the same furniture was afterwards seized and sold to satisfy a judgment recovered against the firm? We do not doubt, but that in a settlement between the partners the value of the furniture thus sold would form a proper charge against the firm in favor of the owner, because his property has been employed for the benefit of the concern—but it is not logical to conclude that his vendor could therefore recover its price from the firm. Such a doctrine would carry us much too far; indeed it is difficult to say where it would stop. It would embrace every species of property on whosoever credit the purchase may have been made—whenever it was on credit. The partner himself whose property may have been sold to pay a partnership debt, could claim of his partners on a final settlement only the amount by which the firm had been benefitted; but according to the doctrine contended for, his vendor would have greater rights and would be entitled to the original price. We are not prepared to sanction such a principle.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed, and that ours be for the appellants with costs in both courts.

DORR ET AL., vs. KERSHAW ET AL.

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April, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

DORR ET AL.
vs.
KERSHAW ET AL.

184 57
48 704

An attachment is dissolved on bonding the property attached. The plaintiff then looks to the bond and not to the property to satisfy his demand. If he fails the bond is discharged.

So, a third party claiming the property attached and bonded cannot intervene in the suit between the plaintiff and defendant. He must look to the person in possession of the property.

This is an action against the drawee and acceptor of a bill of exchange, in which 69 bales of cotton are attached. The defendant bonded the property. M. Flourney intervened and claimed the cotton attached. The court refused to hear evidence on or entertain the intervention, because the defendant had bonded the cotton. There was judgment for the plaintiffs, and dismissing the petition of intervention. The intervenor appealed.

Peyton & Smith, for the plaintiffs :

1. The defendant has not appealed. The judgment against him has become final and cannot now be examined. The appellant has no right to an appeal in this cause. The cotton which he claimed was, when he filed his intervention, wholly beyond the control of the court. If the defendant had improperly bonded the intervenor's property, this might be the basis of a distinct and separate action against the defendant for damages. But all claim on the cotton made in this action ceased with the taking of the bond. The plaintiffs could afterwards have no remedy but on the bond. *See acts of 1839, page 162.* The intervenor has sustained no damage by the judgment from which he appeals. Had he been allowed to prove the property belonged to him, what judgment could the court have rendered in this suit on such evidence ?

2. The appearance of the defendant by his agent and bonding the cotton, released the attachment on it ; Code of Practice, 259. The bond became a substitute for the cotton ; *The State vs. the Judge of the Commercial Court*, 14 La. Rep.,

EASTERN DIS. 592. The claim of ownership of the cotton filed after the April, 1841. bonding by the intervenor had none of the requisites of an intervention. He neither joined with the plaintiff nor with the defendant nor did he oppose both; *Code of Practice, 389, and amendment of 1826.* The defendant by his own act had deprived the plaintiff of his claim on the cotton and had substituted a claim on the bond. The answer of general denial to the petition in intervention could not change the issues between the plaintiff and defendant, or authorize the court to do a vain thing.

DORR ET AL.
vs.
MERSHAW ET AL.

M. Caleb, for defendant.

Chinn, for the intervenor and appellant, insisted that the intervention was improperly dismissed. The bond taken for the cotton was a judicial bond within the control of the court and represented the property attached.

Morphy, J. delivered the opinion of the court.

M. Flourney is appellant from a judgment dismissing his intervention in this suit, wherein 69 bales of cotton which he claims as his property, had been attached and bonded by defendant under article 259 of the Code of Practice. It does not appear to us that the judge below erred. The attachment having been dissolved by the giving of a bond conditioned as the law requires, the cotton was no longer under the control of the court, and the intervenor's claim should have been directed against the person in possession of his property; the condition of the bond entered into by defendant was not to hold the cotton subject to the order of the court, but to satisfy such judgment as might be rendered against him in the suit pending. This personal obligation could not be discharged by the surrender of the property attached; nor could plaintiffs, upon obtaining judgment, exercise any recourse upon it. The bond is a substitute for the property; but only with regard to the attaching creditor, and for the sole purpose of satisfying any

An attachment is dissolved on bonding the property attached. The plaintiff then looks to the bond and not to the property to satisfy his demand. If he fails the bond is discharged.

So, a third party claiming the property attached and bonded cannot intervene in the suit between the plaintiff and defendant. He must look to the person in possession of the property.

judgment he might obtain; as to third parties who set up a claim as owners to the property attached after it has been bonded, they must look to the property itself, not to the bond with which they have nothing to do. There is no privity of contract between the intervenor and the obligors in the attachment bond. The only judgment which could be rendered on this intervention, would be for the restoration of the cotton. Such a judgment would be nugatory because the court would be without the means of enforcing it. As to the bond, no one can avail himself of it except the plaintiff in the suit; if he fails to obtain a judgment, the bond is discharged.

The judgment of the Commercial Court is therefore affirmed with costs.

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April, 1841.

BAINB
vs.
WILSON.

~~CONFIDENTIAL~~

BAINB vs. WILSON.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Either party has a right to interrogate his opponent, and the penalty for not answering is that the interrogatories are to be taken *pro confesso*.

The party propounding interrogatories has only to obtain the order of court to have them answered. The adverse party is bound to answer at his peril.

When the answers are to be taken out of the parish, a commission issues and the party interrogated must give notice of the time and place of answering, so that the person propounding the interrogatories may be present.

A commission is necessary to take the answers to interrogatories out of the State, in like manner as for a distant parish in it.

The mere production of a commission is not sufficient to authorize the person to administer an oath and take the answers, as it does not prove he is the actual person named in the commission and who swore the party.

A commission from the governor that such a person was a magistrate in 1838, does not establish the fact that he was one in 1840, the time when he acts as such.

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April, 1841.

DAINE
vs.
WILSON.

When a commission is directed to a person by name, no proof of his authority or identity is required, but when directed to *any* Judge or Justice of the peace out of the State, it must be shown that *he is such an officer*, at the time he acts, as he purports to be.

This is an action against the defendant as one of several makers of a promissory note executed in the State of Mississippi, payable to the order of and endorsed by John McClellan. The defendant pleaded the general issue: and that the note sued on was given for the price of a tract of land, to which McClellan, the vendor, was unable and failed to make any title. That if the plaintiff is the true owner of the note (which is denied,) he took it after it was due, knowing the equities existing between the original parties. He prays that the plaintiff's demand be rejected; and that he be required to answer interrogatories touching the ownership and consideration of the note.

The interrogatories were ordered to be answered. The party interrogated resided in Mississippi.

It appears the plaintiff went before one E. P. Stratton and answered the interrogatories on oath. The answers, with Stratton's certificate that he received them as a justice of the peace, &c., and administered the necessary oath were transmitted by the plaintiff to his counsel here, who offered them in evidence on the trial. They were accompanied by Stratton's commission from the governor of Mississippi, that he was a justice of the peace in 1838, at the date of the commission. The answers were sworn to before him however in 1840. Their introduction as evidence was objected to, by the defendant's counsel but admitted by the Judge. There was judgment for the plaintiff, and the defendant appealed.

Peyton & Smith, for the plaintiff.

1. The court properly admitted in evidence the answers of the plaintiff to the defendant's interrogatories. These answers might be sworn to before any person authorized to administer an oath. That the officer in this case was a Justice

of the Peace, is proved by his original commission filed with the plaintiff's answers. If the Justice's signature had been forged how could the plaintiff have obtained possession of the original commission? Besides, the moment it is proved he was a Justice of the Peace he becomes an officer of the court for the purpose of receiving the plaintiff's affidavit, and the court will recognize his signature as such.

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VS.
WILSON.

2. The defendant having set up a special defence has thereby waived his plea of the general denial.

Randall, for the defendant and appellant.

Garland, J. delivered the opinion of the court.

This action is brought by the endorsee of a promissory note executed by the defendant and several other persons. The answer presents several grounds of defence; to it are attached various interrogatories, which upon the usual affidavit, the plaintiff was ordered to answer. The defendant took no steps to have the interrogatories answered. The counsel for the plaintiff (who is a resident of Mississippi,) sent a copy of the interrogatories to their client, without a commission or any authority emanating from the court to take his answers. He went before a person who styles himself a Justice of the Peace in and for the town and district of Grenada in the county of Yellabusha, State of Mississippi, and it is certified he answered the interrogatories and swore to the answers.

The cause was fixed for trial on the 16th of November 1840, on which day, the counsel for the plaintiff filed in the record the answers, together with a paper purporting to be the original commission of the person who styles himself a Justice of the Peace to prove his official capacity. These papers were not enveloped or addressed to either the Judge or Clerk of the court, but seem to have been for some time in the possession of the plaintiff's counsel. Upon the presentation of these papers the counsel for the defendant made affidavit that he was informed by his client and believes that he can prove

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by certain witnesses the answers filed by the plaintiff are untrue. He asked for a continuance and a commission to take testimony. Whether these requests were granted the record does not inform us.

The cause was again fixed, and on the trial the plaintiff offered to read the answers to the interrogatories previously filed as evidence. To this the counsel for the defendant objected.

1st. Because no commission ever issued to take the answers; that they do not purport to have been taken by authority of the court; and that it was the duty of the party required to answer interrogatories, when he resides out of the Parish or State, to have his answers legally taken and returned.

2d. There is no legal evidence that the person before whom the answers are sworn to, was qualified to administer an oath on the 7th of May, 1840. The commission only proves he was a Justice at the date of it in May, 1838, and further it is not shown that the person who took the answers is the same person mentioned in it, as the papers are separate and seem in no manner connected.

The Judge overruled the objections and permitted the answers to be read, on the ground that a commission to take them was necessary, that the commission established that Stratton was a Justice of the Peace, and he took for granted his identity and signature. To this opinion the defendant took a bill of exception, and judgment being given against him, he appealed.

Either party has a right to interrogate his opponent, and the penalty for not answering is that the interrogatories are to be taken *pro confesso*.

The party propounding interrogatories has only to obtain the order of court to have them answered. The adverse party is bound to answer at his peril.

We think the Judge erred. By the Code of Practice either party has a right to interrogate his opponent, and the penalty for not answering is that the interrogatories are taken *pro confesso*.—Art. 349, 350.—To relieve himself from this penalty he must answer. The counsel for the plaintiff says that as the defendant wished to use his adversary's answers as testimony, he must take the necessary steps to procure them. We think differently. The defendant by filing his interrogatories and obtaining the order of the court to have them answered, has done all that was necessary, unless he wished them answered

in open court. If he were compelled to have the answers taken he might be placed in a worse situation than he would be, with the penalty for negligence suspended over the plaintiff. If the party interrogated resides in the parish he must answer either in open court, before the Judge at chambers, the Clerk of the court, or some judicial officer having authority to administer an oath in the parish. In that case no commission is required. But if the party reside out of the parish then the article 352 of the Code of Practice directs a commission to issue and a notice must be given of the time and place the answers will be taken, so that the person propounding the interrogatories may be present or have himself represented. Such is the law, although the notice seems to us very unnecessary and calculated to cause embarrassment. When we first read this article we were disposed to think it was the duty of the party propounding the interrogatories to send the commission, but the latter part of it in relation to the notice indicates which party is to have the answers taken.

It is a little remarkable that no provision is made by the Code to take the answers to interrogatories propounded to parties residing out of the State; but it cannot be supposed the Legislator intended the answers of non-resident plaintiffs or defendants should be taken with less formality or sanctity than those of our own citizens residing in parishes distant from that in which their suits may be pending. If non-residents come into our courts to litigate their claims against each other, they are not entitled to more extensive privileges than our own citizens. In the case of *Gabaroche vs. Hebert et al.*; 7 Martin, N. S. 526; a commission was held necessary to take answers at a distance, though the principal question in that case was as to the form of it, and it was held that if in the shape of an ordinary commission to answer interrogatories by a witness, it was sufficient. Article 138, C. Pr., authorises a commission to issue.

We think the judge erred in deciding that the mere production of the commission to Stratton, was sufficient evidence of

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When the answers are to be taken out of the parish, a commission issues and the party interrogated must give notice of the time and place of answering, so that the person propounding the interrogatories may be present.

A commission is necessary to take the answers to interrogatories out of the state, in like manner as for a distant parish in it.

The mere production of a commission is not sufficient to authorize the person to administer an oath and take the answers, as it does not prove he is the actual person named in the commission and who swore the par-

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**VAN PELT &
FOWLER
vs.
EAGLE INS. CO.
ET AL.**

A commis-
sion from the
governor that
such a person
was a magis-
trate in 1838,
does not estab-
lish the fact that
he was one in
1840, the time
when he *acts as*
such.

When a com-
mission is di-
rected to a per-
son by name, no
proof of his au-
thority or iden-
tity is required,
but when di-
rected to *any*
judge or justice
of the peace out
of the state, it
must be shown
that *he is such*
an officer, at the
time he acts as
he purports to
be.

his authority to administer the oath and take the answers. It did not prove the person named in the commission was the same who swore the party. Nor did it establish the fact, admitting the identity, that he was a justice at the time of his signature. He may have been a justice in 1838, but it does not follow that he was one in 1840. In 9 Martin, 291, a nearly similar question was decided. It is well settled, that when a commission is specially directed to a particular person, then no proof of his authority is required. His powers are derived from the court; but when the commission is directed generally to any judge or justice of the peace out of the State, it is indispensably necessary to prove not only that he is what he states himself to be, but is so at the time of signing the certificate. The usual evidence is stated in the case cited, but we are not to be understood as holding, that if on the production of this commission proof of identity had been given and that the man was in the open exercise of his functions, it would not have been sufficient evidence of authority; 13 La. Rep., 282, 360.

The judgment of the Commercial Court is annulled, avoided and reversed, and this cause remanded to be proceeded in according to law; the plaintiff paying the costs of this appeal.

**VAN PELT & FOWLER vs. EAGLE INSURANCE
COMPANY ET AL.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The holders of a negotiable note, receiving it without any notice of the conditions and equities between the original parties and having paid a full consideration therefor, they will recover notwithstanding it was given to the payees on certain conditions, not then fulfilled.

This is an action against the makers and endorsers of a promissory note.

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The defendants set up a special defence which is set out in the opinion of the court, and need not be recapitulated.

VAN PELT &
FOWLER
VS.
EAGLE INS. CO.
ET AL.

The note was negotiable in its form, signed by J. Whitehead, President, payable "to the order of Messrs. Ferguson, Parker & Co.," and endorsed by them "pay to Van Pelt & Fowler, or order." The plaintiffs received the note in New York, and instituted this suit against the Eagle Insurance Company, through its President, who executed the note, and against John R. Parker, one of the firm, who endorsed it to them. Judgment is prayed in this form in solido against all of the defendants.

The judge below decided that the Eagle Insurance Company was liable for the amount of the note, payable according to the stipulations in the agreement passed before H. B. Cenas, Notary Public, the 18th February, 1839. Judgment was rendered accordingly and the plaintiffs appealed.

Peyton & Smith, for the plaintiffs.

Briggs, for defendant.

Garland, J. delivered the opinion of the court.

This action is on a promissory note drawn by J. Whitehead, President of the Eagle Insurance Company, made payable to Ferguson, Parker & Co., or order, twelve months after date, for \$11,980 35, with 6 per cent. interest until paid, dated February 1st, 1839. About the month of July in the same year the note was endorsed by the payees and delivered to the plaintiffs, and not being paid at maturity was protested and suit instituted. The defence is, that the note was made under the condition of not being paid until other claims owing by the company were discharged, that the note was transferred to the plaintiffs as trustees for various creditors in New York, and having been taken by the payees and endorsers subject to the

EASTERN DIS.
April, 1841.

**VAN PELT &
FOWLER
vs.
EAGLE INS. CO.
ET AL.**

condition, the endorsees are bound by it, having had notice of the terms upon which it was made; the defendant therefore asks that if judgment be rendered that it be subject to the condition, which prayer was allowed by the court and the plaintiffs appealed.

It appears from an authentic act on file, that the Eagle Insurance Company having become embarrassed, made an assignment of all its property and assets to Whitehead, to close its business and pay the debts; a schedule of which are annexed to the act. In this act, which is dated eighteen days after the note, Parker, one of the firm of Ferguson, Parker & Co., joins and says they agree to the proposition mentioned, which is to collect and realize all the assets as soon as practicable, and pay over the same to the general creditors in the order specified in an annexed list or statement, in which Ferguson, Parker & Co. are not named at all. The effect of all which, as contended by the defendants, is that they were not to be paid unless something was left after paying every body else, and if the letter of the act was to be adhered to, they were not to be paid at all, which is rather unreasonable.

In the month of July, 1839, Parker being in New York, and his firm being indebted to the plaintiffs and a number of other persons there, endorsed the note and delivered it to the plaintiffs, and at the same time an act was passed stating all the circumstances, and constituting the plaintiffs trustees for the purpose of collecting the note and paying the proceeds to the creditors of Ferguson, Parker & Co., all of whom are mentioned, for and in consideration of which transfer all the creditors named released and discharged Parker and his firm from "all manner of action and actions, bonds, notes, judgments, executions and all other claims and demands whatsoever from the beginning of the world to the day of the date of said act." The amount of debts so discharged exceeds fifteen thousand dollars.

It does not appear that the plaintiffs or any of the creditors

in New York had any notice of there being any conditions attached to the note; it is in the usual mercantile form; they gave a full consideration for it, and we think it ought to be paid in full. If there shall be any loss in consequence, the fault is with the defendants or their agent, in not annexing to the note some evidence of conditions or equities being attached to it. It would have been easy to have omitted the words "or order" on the face of the note, or when the act was passed in this city, to have had the note identified with it, showing some condition annexed. This would have put every man on his guard, and prevented Parker from passing it to the plaintiffs and obtaining a full discharge for a much larger amount of debt owing by him; 3 La. Rep., 241, 261; 1 Martin, N. S., 143; 4 La. Rep., 220.

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VAN PELT &
FOWLER
vs.
EAGLE INS. CO.
ET AL.

The holders of a negotiable note, receiving it without notice of the conditions and equities between the original parties, and having paid a full consideration therefor, they will recover; notwithstanding it was given to the payees on certain conditions not then fulfilled.

We do not consider the plaintiffs as trustees for Ferguson, Parker & Co., in any manner or having any further interest in the note. They (Van Pelt & Fowler) are the representatives of the New York creditors and in no way responsible to Ferguson, Parker & Co., for their management of the trust, they being discharged from all liability to those creditors.

The judgment of the Commercial Court is therefore annulled and reversed so far as it makes the payment thereof subject to the terms of the agreement passed before H. B. Cenas, Notary Public, dated on the 18th of February, 1839, and affirmed in all other respects, with costs.

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April, 1841.

HEATH vs. LOCKE ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

HEATH
vs.
LOCKE ET AL.

Where an agreement bears intrinsic evidence that the consideration had passed at its date, no evidence touching an averment of failure of consideration will be received.

This is an action by Robert Heath, who alleges that he carries on mercantile business under the firm of S. Heath & Co., and that the defendants are indebted to him in the sum of \$2560 49, with costs of protest and interest; being for the amount of their promissory note, executed by Samuel Locke & Co., payable to the order of S. Heath & Co., sixty days after the 4th April, 1840.

The plaintiff further states that by a written agreement of even date with said note, signed by S. Locke & Co., they bound themselves to pay ten per cent. interest on the amount of the note from maturity until paid.

The defendants pleaded a general denial; they admitted however their signatures to the instrument sued on, averring a failure of consideration of the agreement, &c.

It appeared that in consideration of reducing a former note from \$3056 20, to the sum of \$2560 49, and paying ten per cent. interest, the plaintiff consented to renew the note for the latter sum sixty days longer.

The defendants offered parol evidence to prove a failure of consideration, which was objected to, and excluded by the court.

There was judgment for the plaintiff and the defendants appealed.

Peyton & Smith, for the plaintiff.

Durell, for the defendants.

Martin, J. delivered the opinion of the court.

The defendants being sued on their promissory note and an agreement in writing to pay ten per cent. interest thereon, did

not deny their signature, but the plaintiff's right to sue; and pleaded several matters in defence of which they do not appear to have given any evidence. There is, however, a bill of exception taken by them to the opinion of the court, rejecting parol evidence of the failure of the consideration of the written agreement above stated, which is in the following words :

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April, 1841.

HEATH
vs.
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“ NEW ORLEANS, 4th April, 1840.

“ In consideration of Messrs. S. Heath & Co., renewing our note for \$3056 20, due this day, we bind ourselves to pay them at the rate of ten per cent. per annum interest on the renewed note from maturity till final payment of the whole debt.

Signed,

S. LOCKE & CO.”

This agreement bears intrinsic evidence that the consideration had *passed* at its date, and therefore could not fail. The note sued on bears even date with the agreement, and is evidently the one given in renewal of the former, which was for five hundred dollars more; that sum being, as is stated in the answer, the amount which was to be deducted on the renewal.

Where an agreement bears intrinsic evidence that the consideration had passed at its date, no evidence touching an averment of failure of consideration will be received.

The petition alleges that the plaintiff traded under the firm of S. Heath & Co., and the defendants dealt with him as such. This was not denied in any manner; there was consequently no necessity to prove it. The plaintiff had clearly the right to sue him on this contract, and he correctly did so in his own name; adding thereto the style of the firm under which he dealt with the defendant.

It does not appear that the court erred. No part of the defence set up is sustained by any evidence.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs and five per cent. damages.

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April, 1841.

HOFFMAN vs. LAURANS ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

HOFFMAN
vs.
LAURANS ET AL.

Builders who contract with tenants for the repair and alteration of the leased premises, and have their contract recorded, have no lien or privilege on the property under lease.—There is no privity between the builder and owner of the leased property; and the mere consent given in the lease to make the alterations on the premises, renders the lessor in no way liable to the builder.

The lessor is not bound to pay for improvements or alterations made on the leased premises by the tenant when they are not of any advantage to him.

No mortgage or privilege can be established or extended by analogy to similar cases where it is allowed. It is only given by express law.

This is an action against Pierre Laurans as owner, and Stansbury & Tensfield a firm doing business, and lessees of Laurans's house on the corner of Magazine and Gravier street, to render the former liable with the latter for their debt due by note to certain builders, which was transferred to the plaintiff. He alleges that Laurans leased his house to the other defendants, who employed Messrs. Slack & Smallidge, builders to make repairs and alterations on the leased premises. Their contract was for \$2000 and recorded. Stansbury & Tensfield gave their note for \$1500 the balance due on the contract, and the plaintiff alleges that the builders' privilege attaches to the note in his hands and operates as a lien or privilege on the property.

The defendant, Laurans, resisted this demand, on several grounds. There was a judgment in favor of Laurans, and the plaintiff appealed.

Hoffman, in propria persona and appellant.

Briggs, for the appellee.

Morphy, J. delivered the opinion of the court.

Stansbury and Tensfield having rented of defendant a house and lot at the corner of Gravier and Magazine streets, became desirous of converting the premises into large billiard rooms; and they obtained his permission to do so; they engaging to pay

an additional rent and to make at their own expense the necessary improvements and alterations, and defendant agreeing to contribute \$416 towards the cost of the same, and to extend the lease from three to five years. In November, 1836, the lessees accordingly contracted with Slack & Smallidge who undertook for \$2000 to make the proposed improvements, and who caused their contract to be registered in the office of the recorder of mortgages: of the stipulated sum of \$2000, there yet remains unpaid \$1500 the amount of a note given to the builders by Stansbury and Tensfield, but which they suffered to be protested for non-payment at maturity. In the beginning of 1838, the tenants having failed to pay their rent, defendant brought suit against them and had the lease annulled. The tenants on the other hand instituted an action for damages against defendant for having illegally, as they alleged, broken up their coffee house and deprived them of large rents they were receiving from the sub-tenants of the upper story. In his answer to this suit the defendant refers to the builders' claim which Stansbury and Tensfield had neglected to pay. A compromise however took place and the suit in damages was discontinued on defendant's paying to his former tenants a sum of \$700. The plaintiff having become the holder of the note of \$1500 now claims its amount of defendant, and a privilege on his property for the increase of value resulting from the improvements put upon it. Having failed in the court below, he appealed.

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There being no privity between defendant and the builders, it is not easy to perceive what right they had to record their agreement with the lessees, and how such recording can operate as a lien or privilege on his property. The mere consent he gave in the lease that the proposed alterations might be made on the premises in no way renders him a party to the subsequent contract with the builders. It appears to us on the contrary that the latter were thereby fully informed that defendant was not to be liable for any thing beyond the sum he actually agreed to advance to his tenants. It is said that as

Builders who contract with tenants for the repair and alteration of the leased premises and have their contract recorded, have no lien or privilege on the property under lease. There is no privity between the builder and owner of the leased property,

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and the mere consent given in the lease to make the alterations on the premises, renders the lessor in no way liable to the builders.

The lessor is not bound to pay for improvements or alterations made on the leased premises by the tenant when they are not of any advantage to him.

these improvements have been made with the knowledge of defendant and on the faith of a long lease, equity forbids that he should come into the immediate enjoyment of them without assuming the obligation of the lessees to the builders.

From the testimony it is by no means so obvious that these improvements, although amounting to \$2000 were of any advantage to defendant, or that he was upon the whole a gainer by the transaction. These improvements were made to suit the convenience and purposes of the particular tenants who were to keep the property at a high rent for five years; all the partitions, doors, chimney pieces, &c. standing in the house were taken down. It is the opinion of one of the witnesses that although a new building has been placed on the premises, the alterations have been productive of injury rather than benefit to defendant, as the property is no longer habitable, and can now be let only for billiard rooms or for purposes which do not require the conveniences of a dwelling house, and that the future rent will be rather diminished than increased by the change.

It is next urged that as the compromise between defendant and his tenants was entered into with a full knowledge of the claim of the builders, it must have been with the understanding that it was to be satisfied by defendant independent of the \$700 paid to Stansbury and Tensfield. If such had been the fact, the plaintiff could easily have proved it by the testimony of the latter or of Evariste Blanc, who made the settlement for defendant. In the absence of any evidence on this head, we would rather believe that the \$700 which Laurans paid to compromise the matter was accepted by the tenants, because together with the \$416 already received and the arrears of rent due by them, it made up the expense of \$2000 they had incurred for the improvements. As to the builders, when they treated with Stansbury and Tensfield they well knew that they were mere tenants and could create by their acts no charge or lien on defendant's property; they knew they were to look for their payment to them alone, and it is only ten months after

the date of their contract, and when they began to fear that they might suffer by their incautiousness that they thought of having it recorded as a lien on the property. The mention made by defendant of this recorded claim in his answer to the action of his tenants has been urged as a confession that it was binding upon him. We cannot view it in this light; it appears to us rather a complaint on his part that the lessees had failed to pay the builders, as they had engaged to do, and had thus subjected him to difficulty and inconvenience on account of the recording of their claim.

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The appellant has called our attention to article 591 of the Louisiana Code:—It provides that “an undertaker or workman who has made at the instance of the usufructuary any building or improvement on the property and who is unpaid at the expiration of the usufruct, preserves his lien on the property and can enforce it against the owner.” We are called upon to extend by analogy the same privilege to lessees for improvements made during the lease; this we would by no means feel authorized to do, even if the cases were as analogous as the counsel represents them to be; for no mortgage or privilege can exist unless given by express law; La. Code, arts. 3152, 3280. But the right of an usufructuary differs materially from that of a lessee. The one is a real right, a kind of ownership, subjecting the possessor to the payment of taxes and repairs; susceptible by law of hypothecation, and conferring generally a life-estate, which the usufructuary can at any time renounce or abandon, or transfer at his will and pleasure. The other is a right strictly personal giving to the lessee only the use of the property and conferring neither the legal possession nor any proprietary interest in it. 3 Touillier, No. 387, and seq.: articles 500 and 2697 of the La. Code have also been relied on, but in our opinion they have no direct bearing on the case before us; and cannot assist the plaintiff when he seeks to enforce a privilege so adverse to or rather destructive of the right of property. The doctrine he contends for would besides open a wide door to fraud and collusion.

No mortgage or privilege can be established or extended by analogy to similar cases where it is allowed. It is only given by express law.

EASTERN Dis. between lessees and builders; and would place the owner
April, 1841. completely at their mercy. A satisfied contract might be
 suffered to remain recorded against the property without the
 possibility of proof on the part of the lessor or owner that the
 debt created for improvements has been extinguished.

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The judgment of the Commercial Court is therefore affirmed with costs.

TURNER vs. LATORRE ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where a witness is asked how he knew certain facts about S. R., and answers that he was acquainted with the circumstances of S. R. ever since he could recollect, it will be sufficient to account for the facts stated.

Where one of the jurors becomes interested in the case during the trial, it is good ground to award a new trial.

This is an action to recover seven slaves which the plaintiff, Sarah Turner, alleges she is the owner, who were taken from the State of Georgia where she always resided, brought to this State without her knowledge or consent, and in fraud of her rights, and are now in the possession of the defendants who refuse to deliver them up although amicably requested to do so. She prays that said slaves be restored to her and that she have judgment for them or their value and for the value of their services.

The defendants demanded that the plaintiff exhibit her titles to said slaves, to which she replied that she resided in Georgia where she owned said slaves, where title to them can be shown by parol, and that she be allowed to prove title by parol evidence.

The defendants set up title by notarial act. Commissions issued to the State of Georgia to take the testimony of witnesses. On the trial certain depositions were objected to and rejected by the court. The bills of exception are stated in the opinion of this court.

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One of the jurymen in the course of the trial discovered that the slaves in contest, or some of them were liable in the hands of one of his debtors for his debt, issued execution against them before the verdict was given. There was a verdict and judgment for the defendants and the plaintiffs appealed.

Bartlette, for the plaintiff.

Hoa & Canon, for the defendant.

Martin, J. delivered the opinion of the court.

The plaintiff and appellant has called our attention to two bills of exception taken to the rejection of two depositions which she had taken and offered in evidence.

1. The defendants' counsel objected to the reading of the first deposition on the ground that the first cross interrogatory filed by the defendant, Latorre, in the following words; "how did you come to the knowledge of each and every one of the facts above stated;" was not sufficiently answered by the witness in saying, "I became acquainted with the facts as stated in my answers to the direct interrogatories, from my personal knowledge; having been acquainted with the circumstances of Sarah Turner ever since I can recollect." The court sustained the objection on the ground "that a general acquaintance of many years standing is not a means of accounting for the knowledge of particular facts."

Where a witness is asked how he knew certain facts about S. R., and answers that he was acquainted with the circumstances of S. R. ever since he could recollect, it will be sufficient to account for the facts stated.

2. The second deposition was objected to on the ground that the first cross-interrogatory on behalf of Latorre was not sufficiently answered by the witness in saying, "I became acquainted with the facts stated in my answers to the direct interrogato-

EASTERN DIS. ries from my own knowledge, to the best of my belief." The
April, 1841. objection was sustained by the court.

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vs.
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It appears to us the court erred. We have carefully examined the answers to the direct interrogatories in both cases and compared them with the answer to the first cross-interrogatory complained of; and which have appeared to us sufficient. If the defendant thought he might have been benefited, by more particular and detailed answers, he should have endeavored to obtain them by a new commission, with more definite interrogatories propounded.

Where one of the jurors becomes interested in the case during the trial, it is good ground to award a new trial.

A new trial was prayed for by the plaintiff and appellant on the ground that proper and legal testimony was rejected as stated in the foregoing bills of exception; and also that of one of the jury becoming interested during the trial, by causing an execution to be levied on some of the slaves in contestation in the present suit.

There were other grounds set out in the application for a new trial; but either of those above stated, appear to us sufficient to support the motion and cause the case to be remanded.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided, and reversed; the verdict set aside; and the case remanded for further proceedings with directions to the judge *a quo* to admit in evidence the two depositions stated in the foregoing bills of exception; the defendants and appellees paying the costs of the appeal.

FISK vs. COMMERCIAL INSURANCE COMPANY.EASTERN Dis.
April, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

FISK
vs.
COMMERCIAL
INS. CO.

Although a vessel may be old and when injured by sea accidents, require more repairs than a new one, the insurers are nevertheless bound for the necessary repairs to place her in *statu quo*.

This is an action on policies of insurance, on the brig Mary Ann and cargo, on which the plaintiff claims \$1399 88, for the amount of repairs done on said vessel, and for loss on her cargo occasioned by the perils of the sea insured against. A detailed account accompanied the petition, setting out the items of expense and loss for which judgment is claimed.

The defendants pleaded a general denial and the unseaworthiness of the vessel, and denied that the plaintiff sustained the loss he claims.

The case turned entirely on questions of fact and the evidence adduced ; all of which is fully detailed in the opinion of the court.

The plaintiff had judgment for the entire amount of his demand and the defendants appealed.

Benjamin, for the plaintiff.

Preston, contra.

Morphy, J. delivered the opinion of the court.

This is an action on two policies of insurance executed by defendants on the brig Mary Ann and her cargo. The petition alleges that the said vessel being in every respect seaworthy departed from New Orleans on the 8th of May, 1838, bound to Savannah and loaded with a cargo of produce, consisting of corn, flour and bacon; that in the progress of the voyage the ship and cargo suffered damage by reason of the perils insured against, to wit: the perils of the sea ; the said vessel having been driven out of her course by violent winds and currents, and having struck the bottom on the Bahama Banks, which caused her to leak very badly and injured her cargo; that not-

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Withstanding this accident the vessel and cargo arrived at Savannah, where a survey was held, in consequence of which the vessel was ordered to be repaired, and 729 sacks of damaged corn were ordered to be sold. The petition further charges that the injury sustained by the brig amounted to \$1053 55, and the loss on the cargo to \$346 33, making together the sum claimed of defendants.

The answer admits the execution of the policies, but avers that the brig Mary Ann was not seaworthy when she left New Orleans; but that she was unsound and that the losses sustained were not caused by the perils insured against.

There was judgment below for the plaintiff and the defendant appealed.

Two statements annexed to the petition exhibit the separate amounts of the loss on the cargo and of the repairs made to the vessel by order of the surveyors at Savannah. As to the claim for loss on the cargo there seems to be little or no dispute; but it is contended in relation to the repairs that they were not all rendered necessary by the perils insured against, but from natural wear and tear. The evidence shows that this vessel though old was sound and seaworthy when she sailed from New Orleans; that she encountered at sea some stress of weather which began to make her leak, but that having afterwards grounded and struck violently several times on the Bahama Banks, it became difficult to keep her free; that on being hauled up for examination at Savannah, her waist planks were found to be rotten and worm-eaten, a large piece of her keel knocked off, her rudder broken, the butts started, &c. As to what repairs had become necessary from wear and tear, and what were directly occasioned by the accident, the testimony is somewhat variant. One witness, who had acted as a surveyor, declares that the only rotten and decayed parts of the brig were her waist planks, that in other respects she was found staunch and sound; and that all the repairs done to her were necessary from the injuries received at sea, except as relates to her waist

planks. Another says that the chief part of the repairs became necessary in consequence of the vessel being old and her sheathing decayed and rotten, though her timbers were sound. From all the testimony in the record on this head it would be difficult indeed to separate and class the repairs occasioned directly by the accident from those proceeding from decay and rottenness; the vessel being old the repairs must necessarily have been more expensive than those which the same accident would have rendered necessary in a new one, but as she is represented by most of the witnesses to have been sound and strong, she could have run a long time without any absolute want of repairs, but for the injury sustained. The defendants are, we think, bound to defray all the expense of placing her in *statu quo*. On examining the statement of the repairs ordered by the surveyors, we find the ordinary allowance made of one-third of new for old, as also a deduction of \$150 for the waist planks, which being rotten were considered a proper charge against the owner. Upon the whole we find nothing which makes it our duty to reverse the judgment complained of. The appellee has prayed for damages. We do not consider this a proper case to allow any; although the defendants have introduced no witnesses, there are some parts of plaintiff's evidence which might well have induced the hope of having the case remanded.

The judgment of the Commercial Court is therefore affirmed with costs.

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April, 1841.

FISK
vs.
COMMERCIAL
INS. CO.

Although a vessel may be old and when injured by sea accidents, require more repairs than a new one, the insurers are nevertheless bound for the necessary repairs to place her in *statu quo*.

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April, 1841.

BAYNE vs. FOX.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

BAYNE
vs.
FOX.

Clerks of courts are bound to make complete and regular records and append thereto the *proper and true* certificates; and their neglect and disregard of these duties will not be tolerated by this court.

Where the reconventional demand set up grows out of the same transactions with the principal one sued on, even if it be not liquidated, it should be sustained and the two demands tried together.

It matters not whether the demand against which the reconvention is opposed be liquidated or not, provided the reconventional one is connected with the original demand.

This is an action for work done and services rendered; money lent and advanced, to and for account of the defendant during part of the year 1837 and the year 1838; amounting to \$1157 25, for which the plaintiff claims judgment.

The defendant pleaded a general denial and required strict proof of each and every charge against him. He further avers that the plaintiff is indebted to him for money lent and advanced to pay his board and for clothing furnished; all in the year 1838, according to a detailed account which he annexes, amounting to \$1880 50, and prays judgment therefor in compensation and reconvention.

The plaintiff filed a peremptory exception, that the defendant's plea is informal and illegal; that the demand in reconvention is not necessarily connected with and incidental to the original and principal demand; this exception was sustained by the court, and the defendant's evidence rejected; to all of which he took his bill of exceptions.

There was a verdict and judgment for the plaintiff for \$800; and after an unsuccessful attempt to obtain a new trial, from judgment confirming the verdict, the defendant appealed.

Elmore & King, for the plaintiff, urged the affirmance of the judgment, as the questions settled by the verdict were those of fact, and the finding of the jury should not be disturbed.

Mitchell, for the defendant, insisted that the plea in com-

pensation and reconvention was improperly rejected, with the evidence offered in support of it. The defendant's claim was connected with and grew out of the same transactions with the demand sued on, and should have been supported.

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2. The claim offered in reconvention was as much liquidated as that of the plaintiff's demand, and both should have been tried together. The law abhors a multiplicity of actions; see 7 Toullier, Nos. 346-7-8-9; 6 Martin, N. S., 609; 13 La. Rep. 256; C. Pr., 374-5-6-7.

Preston & Larue, on same side.

Simon, J. delivered the opinion of the court.

Plaintiff seeks to recover the amount of an unliquidated account annexed to the petition; the items of which are composed of days' work, money lent to and cash advanced for the defendant at different times during the year 1838. Defendant pleads the general issue, and further avers that plaintiff owes him for cash lent at different times during the same year, 1838, for boarding paid on his account; for clothing to him furnished; for timber belonging to respondent and sold by plaintiff; for money handed him to pay hands employed by defendant and not accounted for, and for other accounts; a sum much larger than the one claimed in the petition; and which, as he alleges, growing out of the same transactions which gave rise to the plaintiff's claim, he pleads in reconvention and compensation of said plaintiff's demand, and prays judgment against him for the balance that may be found in his, defendants, favor.

During the trial before the jury, plaintiff filed his peremptory exception to the defendants reconventional demand, on the ground that it was not necessarily connected with or incidental to his original demand, and moved the court for a dismissal of the reconvention; this was ordered by the inferior tribunal, and the defendant having then offered testimony in support of his reconventional plea, the same was rejected by the

EASTERN DIS. judge *a quo*; to whose opinion defendant took a bill of exceptions.
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The jury returned a verdict in favor of the plaintiff for the sum of \$800, and after having vainly applied for a new trial, the defendant appealed.

The record comes up in a very imperfect state. The clerk and judge both certify that it contains *all the evidence adduced* by the parties on the trial of the cause, and yet it appears that three witnesses were examined in open court, whose evidence was not taken down or has not been copied in the record. The only testimony which the record contains, is the deposition of one John Slater, which was taken by virtue of a commission, and whose evidence, if it stood alone, would clearly have been insufficient to sustain the plaintiff's action. Under such circumstances, we should not, perhaps, hesitate to remand the case for a new trial, as from the certificates of the clerk and of the judge, apparently incorrect, we are not enabled to ascertain for what reasons and through whose fault, the record comes up incomplete.

Clerks of courts are bound to make complete and regular records and append thereto the *proper and true* certificates; and their neglect and disregard of these duties will not be tolerated by this court.

It is not the first time that this court has had occasion to notice the gross negligence and manifest inattention with which certain clerks prepare the records which are to be brought before us, and the inaccurate statements contained in their certificates; but in this case they are so flagrant that we cannot forbear expressing our dissatisfaction, and informing them of our determination not to tolerate any longer such a culpable disregard of the important duties devolved upon them.

Our present inquiry will, however, be limited to the question arising out of the bill of exceptions taken to the dismissal of the defendant's reconventional demand. We think the lower court erred. The demands set up by the parties respectively, are both *unliquidated*, but from the dates of their accounts, the nature of the items therein contained, and the explanations given by the only witness whose evidence is found in the record, with regard to the capacity in which they stood towards each other, it appears to us clear that their said demands must

have originated from one and the same transaction, to wit: the employment of the plaintiff by the defendant. On the one hand, it has been shown that in 1838, plaintiff was employed by the defendant to superintend certain works undertaken by the said defendant; that in his said capacity, he was charged to hire the necessary hands, to discharge them and settle with them. On the other hand, the defendant alleges in his answer, that, at the same time, he paid for boarding and for clothing on plaintiff's account, that said plaintiff sold timber belonging to defendant and retained the proceeds, and that certain sums of money which were handed to him to pay hands employed by defendant, were not accounted for, &c. From these facts and pleadings, we are constrained to come to the conclusion that the two demands are closely connected with each other, that they ought to be tried together; and that the evidence offered by the defendant to substantiate his reconventional plea, ought not to have been rejected.

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Where the reconventional demand set up grows out of the same transactions with the principal one sued on, even if it be not liquidated, it should be sustained and the two demands tried together.

According to the jurisprudence of this court, it is not necessary that a demand set up by way of reconvention, should always be liquidated; in the case of *Agraisse vs. Guedron*, 2 *Martin*, N. S., 73, founded upon the doctrine recognized in that of *Evans vs. Gray*, 12 *Martin*, 475, this court said: "if the plaintiff sues for a sum of money when, at the same time, he is indebted to the defendant in an amount, which though not liquidated, is yet as large as that demanded; in equity and in justice he ought not to recover." The object of the rule is to diminish litigation, and to bring the contest between the parties to a speedy termination; and it matters not whether the demand against which the reconvention is opposed, be liquidated or not, provided the reconventional one is connected with the original demand. The same doctrine was again sanctioned by this court in the case of *Montgomery vs. Russell*, 7 *Martin*, N. S., 288, in which it was held that although an unliquidated demand cannot be pleaded in compensation, yet it may be so in reconvention. In this case, however, the two demands are

It matters not whether the demand against which the reconvention is opposed be liquidated or not, provided the reconventional one is connected with the original demand.

EASTERN DIS. of equal dignity, and *a fortiori* should they be tried in the
April, 1841. same suit.

COGSWELL & CO. It is therefore ordered, adjudged and decreed that the judg-
 vs.
OCEAN INS. CO. ment of the District Court be annulled, avoided and reversed ;
 that the reconventional demand set up by the defendant, be re-
 instated, and that this case be remanded for a new trial ; the
 plaintiff and appellee paying costs in this court.



COGSWELL & CO. vs. OCEAN INSURANCE COMPANY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The insurers are liable for damages done to zinc, occasioned by the salt water getting to and corroding it on the voyage.

This is an action on a policy of insurance in which the plaintiffs claim \$859 67, for damage done to 14 hogsheads of zinc on their passage from New York to New Orleans. The zinc was much corroded and rusted on its arrival, evidently occasioned by salt water on the voyage.

The defendants insisted they were not liable and set up several matters in defence which are fully noticed in the opinion of this court.

There was judgment for the plaintiffs and the defendants appealed.

Clark, for the plaintiffs and appellees.

F. B. Conrad, for the appellants.

Garland, J. delivered the opinion of the court.

This action is on a policy of insurance on 14 hogsheads of zinc shipped on the *Sylvanus Jenkins* from New York to

New Orleans, which the plaintiffs alleged was damaged by salt water. They claim \$859 67, with interest.

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April, 1841.

The defendants plead the general issue; and further that the zinc was shipped on board of a vessel that drew so much water she could not enter the mouth of the Mississippi, in consequence of which she grounded; a portion of the cargo was discharged into a steam tow boat, of which these fourteen hogsheads of zinc was a part. They say if any damage was suffered, it was because of this discharging of the vessel and that there should be a general average. There was judgment for the plaintiffs and the defendants appealed.

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The defendants' counsel has urged us to decide upon a bill of exception he took to the admission of the depositions of the captain and mate of the vessel, on the ground that he had not reasonable notice of the time and place of taking the testimony. We incline to the opinion that the evidence of notice was not sufficient, but it is a matter of no consequence, as we think there is evidence enough to sustain the judgment without these depositions.

It is satisfactorily proved that the zinc was shipped from New York in good order, and when it arrived in New Orleans it was damaged by salt water, much rusted and corroded. Nothing but salt water will make it corrode. There is no evidence the ship drew too much water to enter the river at usual tides but the fact that she grounded and had to take out part of her cargo. Vessel often get aground at the mouth of the Mississippi that do not draw too much water to get over the bar. That the zinc was corroded by salt water raises a strong presumption it was damaged at sea. If the Insurance Company had wished it, they could have had the captain and officers of the tow boat examined to show the damage was done aboard of it. They have not endeavored to obtain the evidence to make out the defence.

The insurers are liable for damage done to zinc occasioned by the salt water getting to and corroding it on the voyage.

The judgment of the Commercial Court is therefore affirmed with costs.

EASTERN DIS.
April, 1841.

BIERNACKI vs. MEXIA.

BIERNACKI
vs.
MEXIA.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

A party setting up an unliquidated demand in compensation and reconvention of a suit on a promissory note, must bring himself strictly within the rules, and be ready with his evidence at the time fixed for trial.

This is an action by Madame Adele Baird, wife of C. Biernacki, on a promissory note signed by Madame Charlotte Mexia, widow of the late General Mexia, and payable to the order of the plaintiff the 24th October, 1840, for \$300.

The defendant admitted her signature, but pleaded an account for goods sold and delivered to the plaintiff amounting to \$500, in compensation and reconvention.

The cause came on for trial the 18th January, 1841, when the defendant's counsel moved for a continuance on the ground that he had on the 13th applied for a commission to take the testimony of a witness in Mexico, &c.: various circumstances are stated in the counsel's affidavit and grounds for the continuance, why this testimony was not had or applied for sooner. The application was overruled and the party ruled to trial. He excepted to the decision of the court.

There was judgment for the plaintiff and rejecting the reconventional demand. The defendant appealed.

S. L. Johnson, for the plaintiff.

Soulé, for the appellant.

Morphy, J. delivered the opinion of the court.

This action is brought by the payee of a promissory note against the maker. The answer admits the defendant's signature, but sets up a claim in reconvention for a larger sum than the amount of the note, and demands judgment for the balance. There was below a non-suit as regards the plea in reconvention, and judgment in favor of plaintiff on the principal demand. The defendant appealed.

The only point presented for decision in this case is whether the judge properly ruled defendant to trial. Her counsel moved for a continuance and showed for cause that shortly before the trial came on he had made an affidavit of the materiality of a witness in Mexico, for the purpose of obtaining a commission. It does not appear that the commission applied for was taken out, interrogatories served on the plaintiff, or any other step taken other than the making of this affidavit. The judge was of opinion that it was insufficient because it did not show that the witness, whose testimony was sworn to be material, had departed from this city before the institution of the suit; and that due diligence had been used to obtain the testimony. We but seldom interfere with the decisions below on questions of this sort; the courts of the first instance have better opportunities than we can have of deciding them correctly; and although we cannot perceive evidence of any absolute want of diligence on the part of defendant, yet when an unliquidated demand, in support of which evidence must be procured abroad, is set up in opposition to a claim on a note of hand, the party praying for a continuance must bring himself strictly within the rules of law and the regulations of the courts. The appellee has prayed for damages; we think that none should be awarded in this case. The record has been filed in this court on the 25th of last month; if delay was the only object of the appellant, as is contended, she has been unsuccessful in obtaining it, and we can allow only such damages as may be equivalent to the loss sustained in consequence of such delay.

The judgment of the Parish Court is therefore affirmed with costs.

EASTERN Dis.
April, 1841.

BIERNACKI
vs.
MEXIA.

EASTERN Dis.
April, 1841.

TAYLOR *vs.* CHASE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

TAYLOR
vs.
CHASE.

In an action of damages for the non-compliance of the lessor with his contract of lease, the plaintiff must prove that he had put the defendant in *default*, in one of the modes pointed out by article 1905 of the La. Code, before he can recover.

Where the lessor repairs to and takes possession of the premises in an *unfinished state*, and does not at the time notify the lessor that he would be held responsible for the delay in finishing them, he cannot recover damages sustained by their non-completion.

The fact of the lessee taking possession of the leased premises, does not entitle him to damages sustained by their unfinished state; as it does not amount to a putting in default according to law.

This is an action to recover damages for failing to finish and complete a large Hotel in Pensacola, by the time agreed on in a contract of lease of the premises from the defendant to the plaintiff.

The plaintiff alleges that he leased of the defendant the large Hotel in Pensacola, by public act before H. B. Cenas, for two years, commencing the first of May 1837. That the defendant was bound to have said Hotel fitted up and put in complete order for his reception on the day of the commencement of the lease; having also acknowledged the receipt of one month's rent in advance. The plaintiff further alleges that relying on the faithful performance of the defendant of his part of the contract, he repaired thither on the day agreed on, with his train of servants, assistants, &c., together with his furniture, provisions, supplies, &c., suitable for keeping a large Hotel, as watering place and general resort of travellers and others, during the warm season, &c.; but that on his arrival, to his great disappointment he found that the Hotel was in a very unfinished and incomplete state both as to the principal and appurtenant buildings, and the whole establishment entirely unsuited and unprepared for present occupation; that in consequence of such default he was unable to receive guests or boarders until the 15th July following, whereby he

sustained heavy losses, &c. to wit: \$9000, for which he claims judgment as damages:—The defendant pleaded a general denial; and averred that he rented said Hotel to the plaintiff to begin the first of May, 1837; and he was to take it in the state of forwardness it was in on that day, well knowing its condition; that it was substantially finished but the plaintiff required many alterations which were made at his request, and were the sole cause of the delay of which he complains. He denies that the plaintiff sustained any loss by his guests or boarders quitting or not coming as he expected; but expressly charges that the plaintiff made large profits, to wit: the sum of \$10,000 nett profits the first year. He also denies that the plaintiff paid any rents, &c.

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Upon these pleadings and issues the cause was tried before the court and a jury.

On the trial the defendant urged that the plaintiff could not maintain his action as he had not put him in default.

Evidence was taken to prove the allegations in the petition, all of which was submitted to the jury, under instructions from the court; one of which was that they must be satisfied from the evidence that the defendant was put *in morâ* before a recovery could be had.

Upon the whole case there was a verdict and judgment for the plaintiff in the sum of \$4700; from judgment rendered thereon, after endeavoring to obtain a new trial, the defendant appealed.

Tho. Slidell & Grymes, for the plaintiff, argued the case principally on the facts and evidence, and insisted that it turned mainly on the proof adduced which was sufficient to sustain the judgment.

Preston, for the defendant and appellant, contended that the action could not be maintained because the defendant had never been put in default, as required by the 1905th article of the Louisiana Code.

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2. The evidence he maintained did not authorize the heavy damages which had been awarded by the jury.

Bullard, J. delivered the opinion of the court.

This is an action to recover damages of the defendant resulting from the inexecution of a contract of lease. The object of the contract was a building in Pensacola intended to be used as a Hotel, and the lease which was for two years was to commence on the first of May, 1837. The plaintiff alleges that about that period he proceeded at great expense with his establishment, consisting of domestics, assistants, furniture and provisions to Pensacola, to take possession and open the public house, but found on his arrival that the said Hotel was still in a very unfinished state, and that the whole establishment was wholly unsuited and unprepared for present occupation, and that in consequence of such default the petitioner was unable to receive guests or boarders until the 15th of July, whereby a heavy loss of profits was incurred, and that moreover he sustained losses from the exposure of his furniture and depredations committed upon his provisions. He estimates his damages at nine thousand dollars. It appears that the plaintiff took possession of the building in its unfinished state at the time contemplated by the lease, but that it was not completed until about the middle of July.

The Jury found a verdict for the plaintiff and assessed his damages at \$4700, and the defendant appealed.

In an action of damages for the non-compliance of the lessor with his contract of lease, the plaintiff must prove that he had put the defendant in default, in one of the modes pointed out by article 1905 of the La. Code, before he can recover.

Among other grounds urged by the appellant for a reversal of the judgment is this, that it is neither alleged nor proved that the defendant had been put legally in default before the institution of the present suit, and consequently the plaintiff cannot recover damages. The jury was instructed that in order to recover in this action it was necessary for the plaintiff to prove, that he had put the defendant in default in one of the modes pointed out in article 1905 of the Civil Code, and that they were to decide from the evidence, whether the defendant was put in default previous to the institution of the

action. This instruction was clearly correct so far as it relates to the necessity of putting the defendant *in morâ*, and although the question what constitutes such putting in default is one of law, yet the sufficiency of the proof was properly left to the jury. But we are called upon to pronounce upon the sufficiency of such proof. The jury appears to have been satisfied of the fact, having found a verdict for the plaintiff. Ever since the decision of the case of Fenwick vs. Erwin, (6 Martin, N. S. 229,) it has been uniformly ruled by this court that damages cannot be recovered for the violation of a contract without proof of a previous putting in default. In the present case it only remains to inquire what would constitute such previous demand and whether it has been proved.

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It is clear that the defendant was not in default either by the terms of the contract itself nor by operation of law; and our only inquiry is, what act of the plaintiff has been shown which according to a just interpretation of the 2d clause of article 1905 of the Code has constituted the defendant *in morâ*, and authorizes the recovery of damages.

A putting in default by the act of the party is clearly defined by the Code.—It is when the party claiming the performance of a contract demands of the other party to carry it into effect which demand may be made either by commencing suit, to enforce the principle obligation, as we understand it, by a demand in writing, by a protest by a notary public or a verbal requisition in presence of two witnesses. In the case before us the lessee repaired to the place and took possession of the house in its unfinished state.—The lessor was not even notified that he would be held responsible for the delay in finishing the house, nothing was done to quicken his proceedings, or hasten the completion of the work. That the plaintiff was not obliged to take possession of the Hotel in its unfinished state, is clear; but having done so he was bound to require of the lessor the completion of the work before he could recover damages for his neglect to do so. The fact that the plaintiff repaired to the spot with his train of assistants and domestics

Where the lessee repairs and takes possession of the premises in an unfinished state, and does not at the time notify the lessor that he would be held responsible for the delay in finishing them, he cannot recover damages sustained by their non-completion.

The fact of the lessee taking possession of the leased premises, does not entitle him to damages sustained by their unfinished state; as it does not amount to a putting in default according to law.

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This view of the case renders it unnecessary to examine other questions which arose in the progress of the trial.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed, the verdict set aside, and that the suit be dismissed with costs in both courts.

MITAINE vs. FERGUSON.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY
 OF NEW ORLEANS.**

' The endorser of a note when sued by the endorsee or holder, has no right to inquire whether the plaintiff, in whom the legal title appears, was the agent or real owner, unless by a fictitious assignment he is about to be deprived of his defence against the true owner.

This is an action by the holder against the payee and endorser of a promissory note, subscribed by one B. F. Chapman, and paraphed *ne varietur*, with a mortgage on a slave named Easter, to secure payment; who was sequestered in this suit.

The defendant admitted his endorsement, but denied his liability to the plaintiff. He specially denied that the plaintiff was the *bona fide* holder of the note.

At the trial, one of the deputy clerks was called as a witness for the defendant, who stated that a man calling himself Jean Baptiste Mitaine came that morning, and told him "that the first suit set for trial was *under* his name, but he had nothing to do with it; and that the endorser had paid him."

The plaintiff produced the act of sale, identifying the note with the act and mortgage on the slave Easter. The cause

was submitted to a jury on the pleadings, and this evidence, who returned a verdict for the defendant. The plaintiff made an unavailing effort to obtain a new trial and appealed.

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Roselius, for the plaintiff and appellant.

Grivot, contra.

Simon, J. delivered the opinion of the court.

This suit is brought by the endorsee of a promissory note of hand against the first endorser thereof. The defendant admitted his endorsement, pleaded the general issue and denied specially that the plaintiff was the legal and *bona fide* holder of the note sued on. The case was tried by a jury who found a verdict in favor of the defendant, and the plaintiff appealed.

The evidence shows that the note was given in consideration of a part of the price of a female slave, and that the same was endorsed by the defendant at the time of the purchase thereof by one Chapman from one Platet, by whose endorsement, said note, paraphed *Ne Varietur*, was transferred to the plaintiff. Proof has also been adduced that due notice of the dishonor of the note was given to the endorser, and that the plaintiff's name was on the back of said note at the time of its protest.

During the progress of the suit, plaintiff amended his petition and issued a writ of sequestration, by virtue of which, the slave having been found in the defendant's possession, was taken by the sheriff in his custody; and after the return of the writ, defendant was allowed to bond the property as his own.

On the trial of the cause, defendant introduced a witness who testified that "a man calling himself Jean Baptiste Mitaine came to him this morning, and told him that the first suit set for trial to day was under his name, but that he had nothing to do with it, and that the endorser had paid him." No plea of payment however is set up in the defendant's answer, who, on the contrary, limits his defence to the plea that the plaintiff is not the *bona fide* holder of the note.

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The endorser of a note when sued by the endorsee or holder has no right to inquire whether the plaintiff, in whom the legal title appears, was the agent or real owner, unless by a fictitious assignment he is about to be deprived of his defence against the true owner.

We are at a loss to conceive on what grounds the jury may have based their verdict:—It is perfectly clear that the defendant had no right to inquire whether the plaintiff, in whom the legal title to the note sued on, appeared to be vested, was the agent or the real owner of it, unless, by a fictitious assignment, it was attempted to deprive him of substantial grounds of defence which he may have had against the true owner; nothing however is set up in the answer which has any tendency to show that the defendant has any equitable defence to oppose to the payment of the note, and it is certainly immaterial to him whether the plaintiff recovers for his individual benefit or as the agent of another; as the judgment here will have the effect of *Res Judicata* against any one who might hereafter claim an interest in the note. 3 *Martin N. S.* 291, 392.—5 *La. Rep.* 48.

It is however contended that there is proof that the amount sued for has, from the declarations of the plaintiff, been paid to him by the endorser:—The evidence of this fact appears to us to be very loose and indefinite; the endorser alluded to cannot be the defendant who, as we have already said, has not set up any plea of payment; and it is difficult to believe that if he had really discharged the obligation, he would not have availed himself of this defence, instead of relying solely upon an exception which seems inconsistent with his actual pretensions; indeed, the allegation that the plaintiff is not the true owner of the note, takes away any idea that the defendant would ever have paid him its amount. The vague declarations of the plaintiff that he had nothing to do with the note and that the endorser had paid him, cannot be construed in any other manner but as meaning that he was acting as the agent of his previous endorser (Platet) by whom he had been paid; and if so, the defendant, who, in the absence of any valid defence, must pay it to the apparent legal holder, has nothing to do with this matter.—We think that the verdict of the jury is manifestly erroneous, and our judgment must be in favor of the plaintiff.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court, be annulled, avoided and reversed, and proceeding to render such judgment as, in our opinion, ought to have been rendered in the lower court; it is ordered, adjudged and decreed that the plaintiff do recover of the defendant the sum of five hundred and ninety-five dollars, and four dollars costs of protest, with five per cent. interest per annum on the said sum from the 14th of February, 1838, until paid; with costs in both courts. And it is further ordered, adjudged and decreed that the female slave *Easter*, specially mortgaged to secure the plaintiff's demand, and heretofore sequestered in this suit, be seized and sold to satisfy the present judgment in principal, interest and costs.

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BERNARD'S HEIRS vs. GOLDENBOW.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A substitution of heirs to take effect at the death of the *gravatus*, or at any uncertain time is to be considered conditional, and can only take effect on the happening of the event on which the condition depends.

Where the husband and wife institute the survivor of them *sole heir*, with condition and substitution that at the death of the survivor, their property *then existing* shall go to each of their heirs in certain proportions, it does *not inhibit the survivor, while living*, from *alienating* the property.

This is a petitory action by the heirs of André Bernard to recover from the defendant a lot of ground in Chartres street, New Orleans. The plaintiffs claim as heirs of their ancestor, who, they allege, died in possession and as owner of this property, in 1790.

The defendant denied that the plaintiffs had any right or title to the property claimed and could not maintain their action; that he and those under whom he claims have been in the

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peaceable and uninterrupted possession of this property under a valid title for upwards of thirty-one years; and that it was sold by the widow Bernard in November, 1815, when he became the purchaser. He pleads every prescription applicable and that he owns and possesses by a good and valid title and prays that the suit be dismissed.

The plaintiffs claim as heirs of André Bernard, and the property was alienated and sold by his widow, as his survivor, under their joint will, instituting the survivor sole heir of the other, of all their property; and any existing at the death of the *survivor* to descend to *their* heirs in certain proportions. See the case of these same plaintiff's against P. Soulé, reported at page 21 of this volume.

There was a judgment for the defendant and the plaintiffs appealed.

Conrad & Denis, for the plaintiffs and appellants contended:

1. That the will of André Bernard contains a substitution in their favor, and that the defendant is without title except for one third of the property in dispute.

2. That even supposing that the clause in the will of André Bernard in their favor did not amount to a substitution, the wife had only a life estate in a portion of the property and could not transfer a title to any greater portion, and that the plaintiffs, being the legal heirs of André Bernard, are entitled to the residue.

Roselius, for the defendant and appellee.

Morphy, J. delivered the opinion of the court.

This case cannot be distinguished from that of the same plaintiffs against P. Soulé, decided a few days since (*ante* 21). The facts are the same, and it must be governed by the same principles and reasoning. As a petition for a re-hearing has since been filed, it is proper to remark that the main ground upon which that suit was determined was the construction we

thought proper to give to the will of A. Bernard, which in our opinion contained a substitution *de eo quod supererit*. The other point that the substitution had failed by the death of the substituted heirs was merely stated as an additional ground, and reference was made to some French authorities; as the will then under consideration was made under the laws of Spain, we would have consulted the Spanish commentators on the subject in preference to the French, had any been at hand. It was not believed there could be much variance of opinion between them on the subject of substitutions, which it is well known descended into the French and Spanish jurisprudence from the same source, the Roman law. On examining Gomez, to whom we have been referred, we find that he distinguishes the case where a substitution is made purely and simply, and that in which it is made under a condition. In the first case, the substituted heir transmits his rights to his descendants if he dies before restitution is made to him. In the second case, the right is not transmitted, and he adds that a substitution to take effect at the death of the *gravatus*, or at any other uncertain time, is to be considered as conditional, according to the legal axiom, *dies incertus pro conditione habetur*. Of the latter kind was the substitution in the present case; Gomez, *variæ resolutiones*, chap. 5, No. 9. From this passage it would seem that Gomez does not hold, as is supposed, a doctrine absolutely adverse to that relied on and in support of which several French authors were quoted by this court.

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A substitution of heirs to take effect at the death of the *gravatus*, or at any uncertain time is to be considered conditional, and can only take effect on the happening of the event on which the condition depends.

As to the construction to be given to the will of André Bernard, we have again attentively considered that instrument, and can come to no other conclusion than that we have expressed. It is true that there are two separate clauses in it, one in favor of the substituted heirs of the wife, the other in favor of those of the husband; although by the place they occupy in the will, these clauses cannot be said to be members of the same sentence, they can, in our opinion, be viewed only as parts of the same disposition, and according to every rule of construction must be explained by each other. These testators

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were making a joint and mutual will ; it was uncertain which of the two would survive the other ; they declare that the survivor shall be the sole and universal heir of the other ; they then provide that at the death of the survivor there are to be two sets of heirs, who are to take in different proportions ; those of the wife one-third of the estate, and those of the husband two-thirds ; but a doubt arises as to what property it was intended should be thus partaken. Surely the two clauses must be brought together and if one of them contains expressions showing unequivocally the intention of the testators, they must of necessity apply to the other clause which treats of the same subject, to wit : the property to be divided among the substituted heirs in the stated proportions. If these expressions were left out of view in the consideration of the latter clause, it would lead to the anomalous and absurd consequence that the will would have given to the survivor the right to alienate as regards one set of heirs, and denied her such a right as regards the other set of heirs, for the same property.

We have been referred to a case reported in 8 La. Rep., 233, in which it is said that this will was annulled at the suit of the heirs of the widow Bernard, as containing a prohibited substitution ; that is: one which prevented the alienation of the property. It is doubtful whether that case should be of any authority whatever in this, or even should be binding on the rights of the parties to it. The suit was brought against an attorney for absent heirs ; no enquiry was made into the nature of the substitution ; both parties admitting that it was one prohibited by the laws in force at the death of the wife in 1834. The opinion of the court was asked on a different point, but this they refused to do ; they said, " as both the appellant and appellees admit the disposition of the property by the will is a substitution which is now forbidden by law and ceased to be legal in this country on the adoption of the Civil Code in 1808, it follows that the Court of Probates decided correctly in annulling and setting aside the will on the ground that it contained a substitution." As was intimated in the opinion delivered

a few days since, we might have decided that case on the ground assumed in the decision just quoted; but as André Bernard died in 1790, and some doubts were entertained whether even a gradual substitution contained in his will would not be valid notwithstanding the subsequent change of legislation on the subject, it was thought more advisable to examine the nature and extent of the disposition under which the plaintiffs claimed. This enquiry has brought us to the conclusion that widow Bernard, as sole and universal heir had the power to alienate the property bequeathed to her; and the legacy to the substituted heirs was of the property of the testators, such as it should be found in the hands of the survivor at the time of her death.

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Where the husband and wife institute the survivor of them sole heir, with condition and substitution that at the death of the survivor, their property then existing, shall go to each of their heirs in certain proportions, it does not inhibit the survivor, while living, from alienating the property.

It is therefore ordered that the judgment of the District Court be affirmed with cost.

DWYER vs. POWELL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

An agent who speculates on the purchase made for his principal, by management to get the article cheap and charges the market price, is not acting in good faith.

The practice of agents charging their principals more than they pay for an article purchased by them, is illegal and should be discountenanced.

This is an action to recover a large sum of money as damages occasioned by the defendant's misconduct and bad faith, while acting as agent of the plaintiff in the purchase of a quantity of tobacco.

The plaintiff alleges that he advanced money to the defendant to purchase for him and ship to his order at La Bacca, in

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Mexico, a quantity of tobacco in bales. That he purchased and shipped 1000 bales, invoiced at \$4 per bale, with the expenses amounting to \$4400, for which he reimbursed himself out of the funds advanced to him ; and shipped it in his own schooner at 25 per cent. higher freight than usual. That the tobacco was damaged, unmerchantable and wholly unsuitable to the market, by which he lost \$20 per bale. He prays judgment for \$10,000 in damages.

The defendant denied generally the plaintiff's allegations and especially all fraud and bad faith; admitted the purchase of the tobacco and shipment in his own vessel, and did so as agent, in pursuance of his orders: that he acted as agent and in good faith, and if the plaintiff has suffered any loss he is not responsible. He admits he did not give \$4 per bale as charged, but by good management he got the tobacco for \$3; and it was customary to charge the market price; if the court think proper, however, one dollar may be deducted; that he purchased the schooner expressly as there was no vessel to be chartered; and shipped a larger quantity of tobacco, as the plaintiff stated he was determined to engross the whole trade. The defendant expressly avers that so far from owing the plaintiff, the latter is indebted to him in the sum of ~~\$2929~~ 24, for freight, charges, insurance, commissions, &c., &c., according to an account annexed, and for which he prays judgment in reconvention.

On these pleadings and issues, and the mass of evidence adduced by the parties, the cause was submitted to a jury, who returned the following verdict:

"We, the jury, find a verdict for the plaintiff, Dwyer, in the principal cause, for \$3770, which includes damages."

A strenuous effort was made to obtain a new trial, and overruled. There was judgment confirming the verdict from which the plaintiff appealed.

Strawbridge, for the plaintiff.

C. M. Jones, for the appellant.

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Garland, J. delivered the opinion of the court.

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The plaintiff alleges he employed the defendant to purchase for him a quantity of tobacco in bales, to be shipped to La Bacca. That he purchased one thousand bales, for which he charged him four dollars per bale, while he had only paid three dollars for it, that he charged four hundred dollars for commissions and expenses, and that the tobacco on its arrival at the place of destination was found to be entirely worthless.

The defendant admits he was employed as agent of the plaintiff, purchased the tobacco for him in good faith and therefore not liable. He further admits he did charge the plaintiff one dollar per bale more than he paid for it, but says it is the custom of agents in New Orleans to charge the market price for whatever they purchase, although they do not pay so much themselves. He says he got the tobacco at three dollars per bale by good management and thinks he ought to have the benefit of it, but if the court should be of opinion that it is not correct, he is willing the extra dollar per bale should be disallowed. He further avers that although the tobacco was not of the best quality, it was good for the price; that the plaintiff refused to receive it, in consequence of expected hostilities between Mexico and Texas, which would prevent him from smuggling it into the territories of the former nation. He also sets up a demand in reconvention for freight, insurance and other charges.

The case was submitted to a jury, who, after an examination of a number of witnesses, found a verdict for the plaintiff for \$3770, for which judgment was rendered and defendant appealed.

An agent who speculates in the purchase made for his principal by management to get the article cheap and charges the market price is not acting in good faith.

The case is one of fact entirely. We think the evidence shows the tobacco was worthless or nearly so. We also think that an agent acting in the manner the defendant has, is not in good faith. We cannot give our assent to the alleged cus-

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The practice of agents charging their principals more than they pay for the articles purchased by them is illegal and should be dis-
countenanced.

tom in this city of agents charging their principals more than they pay for articles purchased for them, and adjudge it unlawful and dishonest although the agent may effect his bargains by good management.

The jury seem to have understood the case, and we see no good reason to disturb their verdict.

The plaintiff has pressed us to allow him ten per cent. damages for a frivolous appeal. If he had come before us as a fair merchant, we should have listened to him with more favor, but as it is not denied his object in purchasing the tobacco was to violate the revenue laws of another nation, we do not think he ought to be much favored.

The judgment of the Commercial Court is therefore affirmed with costs.

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MILLAUDON ET AL. vs. M'DONOUGH.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action for slander of title, when the defendant reconvenes and sets up title, it becomes essentially a petitory action, and the burden of proof of title rests on the defendant.

The last warrantor is the real defendant in a suit against his vendees, not only against the party who cites him, but more particularly against the original actor.

Copies of Township Maps are not admissible in evidence when better evidence can be procured.

So copies from public documents must be certified by the proper officer, who is the keeper of the original. The surveyor general and not the register, has authority to certify township maps to make them legal evidence.

The court will look beyond the confirmation of a claim by the land commissioners or congress, emanating from the former governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed.

When the expression in a grant or title only conveys a certain front and depth the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superficies contained in a parallelogram.

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This is an action of jactitation or slander of title, instituted by L. Millaudon, John Slidell, J. Kohn in his own right and as syndic of the creditors of H. G. Schmidt, and F. Frey, against John M'Donough. The plaintiffs allege that on the 17th May, 1836, they purchased, in conjunction with C. F. Zimpel and H. T. Williams, from A. F. Rightor, a tract of land, forming a part of what is generally termed the HOUMAS GRANT, situated in the rear of three plantations in the parish of Ascension, on the left bank of the Mississippi river, owned by Douredon Bringier, François Laville, and the heirs of Wade Hampton, beginning at the distance of 80 arpents from the river, and containing 90,413 superficial arpents; the lines of which tract run from the rear of the said plantations to the Lake Mau-repas.

The plaintiffs further allege that John M'Donough of New Orleans, publicly asserts that he is the true owner and proprietor of said land, or of a large portion of it; that he has been amicably requested to desist from slandering their title; or if he has any himself, to institute suit and establish his title; but that he declines and refuses to do either; wherefore in consequence of his unjust and illegal conduct they have been deprived of many advantageous offers to effect profitable sales. They allege that they are the true and lawful owners of said tract of land; and that they and those under whom they claim have been in possession of the same ever since the 21st June, 1777; and that M'Donough has no title. They pray that he be cited and required to set forth his titles such as they are, and if he fails, that they be forever quieted in their title and possession, and have judgment for \$50,000 damages. They annex to their petition the act of sale from Rightor to them.

M'Donough joined issue; pleaded a general denial, and set up title to the land in question. He reconvenes; alleges that the plaintiffs have no title, and prays that they be cited to an-

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swer his claim in reconvention, and be compelled to adduce and exhibit their titles; and that he have judgment decreeing him to be the lawful owner, and quieting him in the possession of said land.

The plaintiffs responded to this reconventional demand, averring that M'Donough had no title to this land, but that they have as *bona fide* purchasers from A. F. Rightor, whom they call in warranty and require to defend the original titles thereto.

Rightor appeared, and denied that he was responsible in warranty; that he had exhibited the original titles, with which his vendees, the plaintiffs, were well acquainted, and that they had a perfect knowledge of the pretended claim of M'Donough. He avers that he was the only true and lawful owner at the time he sold this land, and that M'Donough has no title whatever to the premises in contest; but is now bound to sue and establish his pretended claim or abandon it.

Upon these pleadings and issues the cause was tried before the court.

The first question raised is, on whom lies the burden of proof or who holds the affirmative? It was ruled to lie on M'Donough. Holding the affirmative, he produced as the foundation of his claim, a French grant to one Pierre Joseph Delille Duparc, dated April 3d, 1769, *giving natural boundaries*; having 30 arpents front on the Mississippi, with the depth between it and Lake Maurepas; embracing land where formerly existed two indian villages of the Collapissa Indians, situated about 16 leagues above the city, measuring from the plantation of Allemand to that of Joseph Lacombe, a mulatto man. This grant appears never to have been actually or definitively located.

The defendant, M'Donough offered a plan or plat of survey made by one F. V. Potier, purporting to be a plan extracted from minutes of his operations as surveyor, in 1806, 1808 and 1812, showing the lines as represented by him of the eastern shore of the Maryland Louisiana Company, which M'Do-

nough claims, and others marked out in three large divisions, covering the lands embraced by the villages of the Collapissa Indians, the grant to Delille Duparc, &c. This plan or location fronts on the Mississippi river and extends back 18 miles to the river Amite, opening like a fan by diverging lines; and upon this plan, the defendant relies as a location of his title. It is made out and signed by Potier, styling himself a sworn surveyor, in 1812. The location relied on does not touch Lake Maurepas as required by the French grant to Duparc, and does not purport to be made by authority of the government or any officer thereof.

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From all the evidence adduced, the District Judge was of opinion that the defendant failed to make out title to the *locus in quo*. That the French grant under which he claimed, if valid and properly located by parallel lines would not touch or interfere with the lands claimed by the plaintiffs. There was judgment in their favor, quieting them in their possession against the pretensions set up by the defendant, and he appealed.

Preston &asley, for plaintiffs, and Rightor, called in warranty

Grymes & Strawbridge, for defendant.

Garland, J. delivered the opinion of the court.

The Plaintiffs allege that they with Henry T. Williams and Charles F. Zimpel, purchased a large tract of land of A. F. Rightor, being a portion of a claim or grant generally known as the Houmas, in the parish of Ascension. They took possession, with the intention of dividing it into smaller tracts and selling them at auction, to affect a partition; but were prevented from doing so, by the acts and conduct of the defendant, who publicly declared that he was the owner of a large portion of the land, and slandered their title. They say they have requested him to desist his slanders or to bring suit to assert his

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title, which he declines. They pray that he be compelled to set forth his title, if he has any, and if he fail to do so, that they be quieted in their possession against his claims and pretensions, that he be enjoined to desist therefrom; and further, that they have judgment for fifty thousand dollars damages for the tortious acts of said defendant.

The defendant pleads a general denial, then specially that the plaintiffs have no title; he further avers that he is the true and lawful owner of the land by good and sufficient titles, and concludes by a demand in reconvention, in which he prays the plaintiffs may be cited to answer; that they be compelled to produce and exhibit their titles; and that he be quieted and maintained in his possession of the land.

The plaintiffs, for answer to this reconventional demand, plead the general issue, and called on A. F. Rightor, as their warrantor, to maintain and defend their title against that of M'Donough. Rightor answers the call in warranty, by a plea of the general issue; secondly, that the plaintiffs are not entitled to the remedies against him, which they claim; thirdly, that they had a perfect knowledge of the character and extent of the defendant's claim when they purchased, and therefore have no right to call on him as warrantor. He further says the plaintiffs have a good and sufficient title; that M'Donough has none at all; and if he has, he is bound to sue the plaintiffs to establish it or abandon his claim. He prays that M'Donough be compelled to exhibit his title, that it be rejected, and he concurs in the prayers of the plaintiffs against him, (M'Donough).

It is further prayed that the cause be tried by a jury; but subsequently the parties agreed to submit the question of titles to the court, reserving the damages to a trial before the jury.

The issues in this case are somewhat complicated, it has been argued at great length and with eminent ability. A variety of questions have been raised by bills of exceptions, which with the evidence, have swelled the record to a great size, and both plaintiffs and defendant evidently desire the court

to go much farther into an investigation of, and decision upon, their respective titles, than is necessary for the settlement of the controversy between them. We think we can see difficulties enough, likely to arise out of both these claims, in which persons not now before us may be interested; we shall not anticipate the points that may hereafter be made, and will now only decide what is indispensable to the adjustment of the difficulty between the parties before us.

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The first question is upon which party lies the burden of proof, as to the title of the land. The defendant says it rests upon his adversaries and their warrantor. We think differently; the reasons given by the District Judge in his judgment have not been refuted, and are, in our opinion unanswerable. He says the demand of the plaintiffs in their original petition does not constitute a petitory action. It is destitute of the first requisite of that action; not being brought against a party alleged to be in possession; C. P., art. 43. On the contrary the plaintiffs allege they are in possession and are disquieted and prevented from making a legitimate use and profit out of their possession and title by the words and acts of the defendant, for which cause they ask for damages; and that he be enjoined from setting up any claim for the future, unless he do it at once, either in the present action or by another suit. It is true, the defendant says he is in possession also, and had he rested his case upon that allegation, it is possible the question would have been limited to that inquiry; according to article 49 of the Code of Practice. But the defendant has gone further, without excepting to the form of the action; he comes up to the mark, sets up title in himself and institutes a reconventional demand, asking that the property be adjudged to him. This reconventional or cross action, which is by the Code of Practice consolidated with the principal or original suit, is clearly petitory; and imposes on M'Donough the obligation of making the proof requisite to sustain his demand. So fully does this seem to have been understood by the parties originally that all the subsequent proceedings are in accordance with the idea

In an action for slander of title, when the defendant reconvenes and sets up title, it becomes essentially a petitory action, and the burden of proof of title rests on the defendant.

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of the original defendant having become *pro hac vice* the plaintiff. The plaintiffs cite their vendor, Rightor, in warranty to defend their title, according to C. Pr., articles 379 *et sequiter*. Every provision of that Code assumes that the warrantor is a defendant in the issue. There are various decisions of this court, and we hold it to be well settled, that the last warrantor is the real defendant in a suit against his vendees, not only against the party who cites him, but more particularly against the original actor. That person in the present suit, so far as Rightor is concerned, both in substance and form, is M'Donough, whose pretensions he is called upon by his vendees to resist. This question has been heretofore decided by this court in 9 Martin, 556, and 11 La. Rep., 188, and we see no reason for changing the precedents.

M'Donough, holding the affirmative of the issue, offered in evidence a certified copy, from the register or record of complete grants in the Land Office in New Orleans, by which it appeared that on the 3d of April, 1769, the French Governor of Louisiana granted to Pierre Joseph Delille Duparc, père, a tract of land having thirty arpents front on the Mississippi river, with all the depth which might be found to Lake Maurepas, of the land where formerly stood two villages of the Collapissa Indians, situated about sixteen leagues above the city on the same side, to take from the plantation of a person named Allemand, and join that of a free mulatto man named Joseph Lacombe. The usual stipulations and reservations are made in this grant. To its reception in evidence various objections were made, which were overruled and bills of exception taken by Rightor, and the grant attacked after it was received, as being a nullity on various grounds. It is not necessary in the present case to decide any of these questions.

The counsel for Rightor on whom devolved the whole defence of this case (the plaintiffs not appearing at all, further than to join issue with M'Donough) insists that supposing the grant to Delille Duparc to be genuine, given by competent authority, and all the rights of the grantee vested in his oppo-

ment, (all of which he specially denies however) that then this action cannot be maintained, because, he says, being for a certain front and depth and it not being specified that the lines are to open or close in any manner, it must be located by parallel lines, and the evidence shows conclusively that if so located, it will not touch any portion of the land claimed by the plaintiffs. But the counsel for M'Donough insist the lines should open upwards of twenty degrees, and endeavor to prove that it has been located and should so continue, as to let the lower line touch the western shore of Lake Maurepas, and the upper running westerly, strike the Amite river, at a distance of about nineteen miles from the Mississippi and nearly that distance from the point where the lower line touches the lake. Nothing is said in the grant about the Amite river, nor is it shown that the lines should open in this manner so as to include the sites of the two Indian villages mentioned in it. If this location were to be sanctioned the Duparc claim would cover somewhere about 100,000 arpents of land.

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To sustain their position, the counsel for M'Donough insist strenuously on what they call a plat made by Don Carlos Trudeau, in 1790, which they say indicates the partition of the tract among the heirs and legal representatives of Delille Duparc, as on it, it is said, the lines open in the rear as claimed. This document was objected to as evidence by the counsel of Rightor, but received by the court with the exception of a written memorandum on it, and a bill of exception taken, which we consider it unnecessary to decide on, as we think the paper does not prove what is alleged, nor is it entitled to any weight as evidence. It is neither a survey or plat, or a copy properly authenticated, showing how the partition was made. On the face it is apparent a partition had been made previously and there is evidence in the record showing it must have been made several years previous, as one of the heirs sold her portion to Fonteneau in 1784. This plan is evidently nothing more than a sketch made by Trudeau to represent the front of the tract, which it seems

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had increased from thirty arpents front in 1769 to upwards of forty arpents in 1790. There is not about it that particularity and neatness which marks the operations of the former Surveyor General of the Province of Louisiana. The lines drawn seem to be experimental or provisional. None of those running out from the river have any length marked and out of fifteen lines drawn or dotted, but six have any bearing indicated, and that is different on each of them. The statement in writing on the face of the sketch indicates its true character. It is not in the form of a proces verbal, but is stated to be a note, which says that the land belonging to the succession having been asserted to have thirty-five arpents front, according to the declarations of the parties interested, and conformably to the writings and sales passed by the heirs in favor of Henri Fonteneau, Gelar Pedro Le Bourgeois, Alexander Laing, mulatto, and Don Francisco Duparc, the son, the only one who had not sold his portion; but from the verification that was had in the month of March, 1787, repeated this day, the 10th of August in the current year, the same was found to contain forty arpents and twenty-three toises front on the Mississippi, measured upon the lines marked (punteas) a. b. c. &c., &c. This is dated the 10th of August, 1790, and signed by Carlos Trudeau. In no part of this note or statement does he assume any official character. If this plan or sketch was of any validity at all, it would perhaps prove more for the defendant than he wishes, as it fixes his claim in the parish of St. John the Baptist, instead of the county of Acadia. In connection with this plan we find another in the record, which is authentic, that differs from it in various particulars. It appears that Henri Fonteneau in 1784 purchased of Madame Macnamarra, one of the heirs of Delille Duparc, her portion of the land, being one-fifth. In the act of sale, made in presence of the Commandant of the Post or Parish of St. John the Baptist, the land is described as a tract in that parish, having seven arpents front on the river, by the ordinary depth (*profondeur ordinaire*). Not a word is said about the lines extending to the lake, or their opening. On the 24th

of September in the year 1790, Trudeau makes a survey of this land, places it in the parish aforesaid, gives it a front of eight arpents, four toises and three feet front, and states the lower side line to run north eight degrees and fifty minutes east, and the upper, north ten minutes west, according to the needle, without attending to the variation. (Norte ocho grados cinqueto minutas este, de la actual agujasin attendes a la variacion.) This varies widely from other plans and surveys submitted to us, it in fact differs from any other plat that we see in the record, and it is the only authentic one of the lower portion of the Duparc claim made by authority of the Spanish government. We have no other evidence of any well-founded claim to an opening towards the rear, till M'Donough and Brown became interested in the land. They purchased upwards of eighteen arpents front by eighty in depth of Pierre Le Bourgeois the 3d of March, 1806, and in the act of sale there is nothing said of the lines extending beyond that depth or opening in any manner, but it is mentioned that two plats of surveys exist and were delivered by the vendor to the purchasers, paraphed by the notary, neither of which are produced.

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When the inventory of Delille Duparc's estate was made in 1776, the land is represented as extending to Lake Maurepas, but not a word said of there being an opening towards the rear. Sometime after M'Donough and Brown purchased of Le Bourgeois, they presented the claim for confirmation to the Commissioners of the United States in the eastern district of Louisiana, and represent it as having a front of eighteen arpents, three toises and three feet, by eighty feet deep, and having an opening of twenty degrees and *seventy-one minutes* towards the rear, and with the exception of a small portion it was confirmed to that extent; American State Papers, vol. 2, Public Lands, 332. This claim was based upon a grant of the Spanish Government to Le Bourgeois, nothing being said about a grant to Duparc.

Another portion of this claim was derived from Duparc, through L. H. Guerlain, agent of the Eastern Shore of Mary-

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land Louisiana Company. We have carefully examined this branch of the title and find nothing to prove the claim had any opening until sometime after it was recognized by the United States. In the 2d vol. American State Papers, relating to public lands, p. 297, this claim was presented for confirmation and described as "situate on the east side of the Mississippi river, in the county of Acadia, containing ten arpents and seven toises in front, and in depth extending to Lake Maurepas, bounded on one side by M'Donough and Brown, and on the other by land of Antoine Tregle." Not a word is said about an opening. The claim is confirmed for a depth of forty arpents and rejected for the remainder. On pages 300 and 343 of the same volume it will be seen these claims were again under the consideration of the Commissioners and rejected. An examination of the title to the remaining portion of this claim, which comes through Tregle, establishes the fact that the idea of the Duparc grant opening towards the rear was of modern origin. It is certain that M'Donough did not consider it as extending to the Amite river previous to 1806, as he was himself established on that stream some years previous under a different title or as a trespasser.

We have been thus particular in the examination of all these circumstances to show that the effects of the subsequent action on the claim are not such as contended for by the defendant.

In the American State Papers, vol. 3, relating to the Public Lands, p. 254, and from the record, we ascertain that McDough & Co. again applied to the Register of the Land Office and Receiver of public monies in New-Orleans to report on this claim, under the provisions of the act of Congress passed the 27th January, 1813, entitled "An Act giving further time for registering claims to land in the Eastern and Western Districts of the Territory of Orleans, now State of Louisiana." It is described as "a tract of land situated in the county of Acadia on the East shore of the Mississippi, sixteen leagues above New-Orleans, containing thirty-two arpents front, with a depth extending as far as Lake Maurepas. This tract has

formerly been claimed before the Board of Commissioners and the depth extending beyond forty acres, rejected by them for want of evidence of title; but the claimants have since produced a complete French title for the whole quantity claimed, in favor of Delille Duparc under whom they claim, dated the 3d of April, 1769." This claim is placed by the Register and Receiver in the first class, which they say comprehends such claims as stand confirmed by law. It will be observed that the grant to Delille Duparc is now spoken of for the first time; his claim whenever mentioned previously was described as one derived from the Collapissa Indians, yet no mention is made in this report of its having any opening in the rear. That difficulty is met by the defendant, by the production of a paper which he says is a survey and plat of his claim made by F. V. Potier, a United States Surveyor, which it is certified was offered as part of the evidence in support of the claim, when last presented for the action of the United States Commissioners, and it is alleged, that as the claim was confirmed, it must necessarily be so to the extent mentioned in the plat, it being a portion of the evidence. Admitting for a moment, that this plat is valid, we are not prepared to say that the proposition is true to the extent stated. One piece of evidence does not fix the extent and character of a decision, but we must look to all that is offered and the amount demanded. There is nothing in what is said by the Register and Receiver, which authorizes a belief that any opening was claimed or any was intended to be confirmed. McDonough & Co. simply say they claim a "front of thirty-two arpents, with a depth extending as far as Lake Maurepas," under a complete title to Duparc, and the Commissioners say it is a claim that stands confirmed by law.

The omission to mention any thing about the plat, goes to show it was not regarded or had but little weight, and we can scarcely suppose that so important an opening as is claimed, would have been passed over in silence if it had been seriously pressed.

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We are of opinion, that the plat even if admissible as evidence, is not entitled to any weight as establishing the extent of the claim. Although Potier says he is a sworn Surveyor, commissioned by the Surveyor General of the United States, we know of no right that gives him to run out claims under the direction of individuals merely, and fix the boundaries of those not recognized by the government. It is not pretended he acted under any authority from his superior in making what is called a survey; it never was presented to the Surveyor General for his approval, nor does it seem to have had the legal sanction of any one authorized to act in the premises. Potier does not pretend it is a regular survey, he calls it "Plan extrait des minutes de nos opérations d'arpentage faites dans les années 1806, 1808 et 1812, lesquelles lignes en divers temps ont été parcourues jusqu'à la rivière Amite et démarquées conformément aux lignes du plan." He then goes on to say Delille Duparc had derived his title from the Collapissa Indians and sold it to various persons. He does not seem even to have heard of a grant from the French government in 1769, or attempted a location in conformity to it.

The defendant further states, that his claim has been located by the United States since its confirmation, and surveyed in the manner claimed by him. To establish this, he offered in evidence copies of three township plats, to wit: Township No. 10, South; ranges five and six East, and township No. 11 South; range five East. To the introduction of these plats as evidence, Rightor objected; because the papers are not nor do they purport to be copies of the original plats of those townships, and for other causes mentioned in his bill of exceptions. The District Judge admitted them in evidence, in which we think he erred. The papers are copies of copies, and it is a well settled rule of evidence that they are not admissible as testimony when better evidence can be procured. It is further apparent from the certificate of the Register of the Land Office, that they are not correct copies. The claim of McDonough is represented on these copies in a manner differing

Copies of copies of township maps are not admissible in evidence when better evidence can be procured.

from that in which it appears on the plats in the Register's office. The Register states on one of the plats, that on the original "Section No. 1 is not colored," but that he had "represented it as it now appears, at the request of John McDonough, Esq." The coloring of these maps was perhaps not intended to deceive or impose on any person, but when it is recollected that surveyors represent private claims properly located on their plats, in a coloring different from public lands or doubtful rights, such a representation is calculated to make an erroneous impression. But the objection most fatal to the reception of these plats as evidence, is that they are certified by a person not the keeper of the original. The Surveyor General of the United States for this State is the officer who has charge of the public surveys, and he is the proper person to certify the township maps. 2 vol. Land Laws, 294—sec. 6. The copies of public surveys deposited in the office of the Register of the Land Office are placed there for his government and to enable him to perform the duties imposed by law, but he has not legal authority to certify copies so as to make them legal evidence. The law entrusts that power to another person.

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So copies from public documents must be certified by the proper officer, who is the keeper of the original. The surveyor general and not the register, has authority to certify township maps to make them legal evidence.

Although we are of opinion these plats were improperly received in evidence, we have examined them with a view to see if the pretended survey would justify the claim of the defendant. We do not find in the record the slightest evidence of authority from any officer of the United States to locate this claim in any manner. The acts of Congress of the 12th of April, 1814, and the 3d March, 1831, direct the mode of locating private claims. Land Laws, vol. 1, 652—sec. 3—4. Idem, vol. 2, 294—sec. 6.

The court will look beyond the confirmation of a claim by the land commissioners or congress, emanating from the former governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed.

There are also other acts of Congress in relation to the location of particular classes of claims, but the defendant does not come within the provisions of any of them.

It has been decided that the court and jury will look beyond the confirmation of a claim by the land commissioners or Congress emanating from the former governments of Louisiana in

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When the expressions in a grant or title only convey a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear and thereby obtain more than the superficies contained in a parallelogram.

order to ascertain the extent and boundaries of the land claimed.—11 La. Rep. 587.—We have acted on that principle in this case, and see no reason to depart from our previous decisions, that when the expressions in a title only convey a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superficies contained in a parallelogram, unless there be something in the grant to authorize the opening, or from the peculiar position of the claim, it shall be necessary to give the superficial quantity. That does not appear necessary in the case before us.

We repeat, that it is not our purpose to decide in any manner upon the validity of the Houmas grant under which the plaintiffs claim, nor do we decide any thing more in relation to that alleged to be in favor of Delille Duparc, under which the defendant claims, than to say, whether it is for thirty or forty arpents front, and is eighty arpents or more in depth, it must be located by parallel lines, unless the confirmation to McDonough and Brown for eighteen arpents three toises and three feet front by eighty in depth, should for that quantity authorize the opening mentioned in the report on the claim, but it cannot extend beyond it.

It is clear from the evidence before us, that the claim of the defendant if located in the manner specified, cannot in any way interfere with the land claimed by the plaintiffs as shown by the plats laid before us.

The judgment of the District Court is therefore affirmed with costs.

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THEN PRESIDING.

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A promise to endorse a note made payable to the defendant, proved by parol evidence is sufficient to authorize *a recovery*, although he refused to put his name to it.

This is an action against the defendant, as payee, and on his *promise* to endorse a promissory note for \$1429, signed by John Hoey, given as alleged for work and mechanical labor done and materials furnished, at the plaintiff's Iron Foundry. The note is not endorsed by the payee, who, it is alleged, refused to endorse it as he promised to do. Judgment is demanded against him for the amount of the note.

The defendant pleaded a general denial.

Witnesses were called to prove the promise of the defendant to endorse the note sued on; that it was given for work and repairs done on a steam engine belonging to John Hoey, the defendant's son-in-law; and that the plaintiff would have seized and sold the engine to remunerate himself but for the defendant's promise, to endorse the note in question. There was a verdict and judgment for the plaintiff, from which the defendant, after an unavailing effort to obtain a new trial, appealed.

Lockett & Micou, for the plaintiff.

Preston, for the appellant.

Simon, J. delivered the opinion of the court.

Plaintiff seeks to make the defendant liable for a sum of \$1439 18, which he alleges to be the amount of a note of hand, the consideration of which was work and labor done and materials furnished by him to one John Hoey, for and to a certain steam engine by him made for the said Hoey. He represents that to secure the payment for said work, labor and materials, the defendant promised to endorse the note which was to be given by Hoey; that after said work was done, he

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presented the note to the defendant who declined and refused to endorse the same as promised ; that the promise to endorse said note by said defendant, was his chief inducement to execute and deliver said work and materials ; and that without such promise, he would not have done and delivered said work, materials and engine.—The defendant pleaded the general issue ; the case was submitted to a jury who found a verdict for the plaintiff, and after having unsuccessfully attempted to obtain a new trial, the defendant appealed.

The record contains two bills of exceptions, which we do not deem necessary to examine ; one of them was taken by the defendant, and the other by the plaintiff. The former relates to evidence adduced by the plaintiff to prove an amicable demand which was not at issue ; and whatever might be our opinion on the latter, would not make any material change in the final disposition of the cause.

The principal facts disclosed by the evidence, show, that in 1832, plaintiff made a steam engine for Hoey, which was delivered ; that Hoey signed a note made payable to the order of the defendant for the price of said engine, which note was presented to said defendant who, although admitting that he would have endorsed it, if the engine had been delivered when it was promised, declined to do so for reasons by him assigned ; a witness states that defendant had promised to endorse a note drawn by Hoey, for the price of the engine in question, which is the same note sued on, and that Hoey was present at the time said promise was made ; that said promise was made unconditionally ; and that the inducement held out to defendant to endorse the note was to prevent plaintiff seizing the engine, and to effect a sale of it and of the property on which it stood. Another witness testifies to other facts and circumstances which would go to establish a promise made previous to the work being finished and delivered ; but Hoey himself, the principal debtor, and son-in-law of the defendant, swears that he did not sign the note till several months after the delivery of the engine.

The jury heard the witnesses who testified before them, and appear to have entirely disregarded the bearing of the testimony given by the defendant's son-in-law; they were the proper judges of the contradictions found in the evidence, and were undoubtedly induced to think from all the circumstances of the case that when Hoey drew his note to the order of the defendant so as to be by him endorsed, he did so in consequence of an understanding previously existing between them to that effect.

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A promise to endorse a note made payable to the defendant, proved by parol evidence, is sufficient to authorize a recovery, altho' he refused to put his name to it.

On the whole, although the evidence is not perhaps so conclusive and satisfactory as might be required, if the case had been tried before the court, we are not prepared to say that the verdict of the jury is so manifestly erroneous as to make our interference necessary, particularly as the Judge *a quo*, though reluctantly, has not thought himself bound to allow the defendant the benefit of a new trial.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The endorsee or holder of a note who takes it after maturity, holds it subject to all the equities existing between the original parties.

So where S. makes his accommodation note to D. to enable him to raise funds with an understanding that the latter was to pay it, if he used it, and he passed it to the plaintiff *after it was due*, in his action to recover of the maker he was non-suited.

This is an action by the holder of a promissory note signed by Wm. Stackhouse & Co. payable to the order of Greenbury Dorsey, six months after the 20th December, 1838, for \$5163.

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The defendant avered that the note sued on was given without consideration, entirely for the use and benefit of Greenbury Dorsey, whose credit was bad, with a view to raise money; and it was agreed that if he used the note he was to pay it at maturity. He further states that the plaintiff took the note after it was due, with a full knowledge of the circumstances under which it was given, and that he could not recover of the maker.

Under these pleadings and issues the case was tried before the court.

It appeared that Wm. and Saml. Stackhouse, in January, 1839, gave to Dorsey a mortgage on several slaves to secure the payment of this note. Dorsey transferred the note to plaintiff after it became due, to secure him against the endorsement of a bill of exchange. Before this bill was due and protested the plaintiff sued on the note. The question then recurred, was the want of consideration set up in the defence, sufficient to avail the defendant?

The Judge presiding was of opinion it should prevail. On a motion for a new trial, the judgment first rendered being for the defendant, was changed into one of non-suit against the plaintiff, and he appealed.

G. B. Duncan, for the plaintiff.

Hoffman & Jones, for the defendants.

Morphy, J. delivered the opinion of the court.

This suit is brought on a promissory note drawn by Wm. Stackhouse & Co. to the order of and endorsed by Greenbury Dorsey. The petition alleges that the said firm consists of defendant, S. Stackhouse and Greenbury Dorsey. The defence set up is that this note was given to the payee without consideration and entirely for his use and benefit, in order to enable said Dorsey whose credit was bad, to raise money upon

it; that it was agreed if he used the note, he would pay its amount when due, and that plaintiff took the note with a full knowledge of all these circumstances. There was a judgment below in favor of defendant, which was afterwards changed into one of non-suit, on a motion for a new trial. Plaintiff appealed.

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It is admitted that long after the note sued on became due, it was pledged to the plaintiff to secure him against his endorsement on a bill of exchange drawn by Dorsey on one George Young of Cincinnati. It is well settled that the endorsee or pledgee of a note takes it after maturity subject to all the equities to which it would have been liable between the original parties to it. The evidence shows that after the note was made, Stackhouse & Co. gave a mortgage on several slaves to secure its payment. The book-keeper of Dorsey testifies that he understood from the latter that he had obtained this note to raise money with it, and that although it was usual for Dorsey to make an entry on his books of all notes received by him, no mention whatever was made of this particular note. From the evidence we incline to think with the Judge below that it was an accommodation note given to Dorsey to facilitate him in his business, and that the mortgage was given only to aid its negotiation. The defendant has at all events made a sufficient showing to throw upon the plaintiff the burthen of proving a consideration, if any had existed.—This was not even attempted to be done. If Stackhouse & Co. merely lent their name to Dorsey as drawers of this note which was made payable six months after date, it is clear that having failed to raise money on it before its maturity, his authority to dispose of it had ceased, and it should have been returned to them. Besides, if it be true, as is alleged by the plaintiff himself, that Dorsey, the payee of this note was a member of the firm of Stackhouse & Co., this debt, admitting it to be real, must go into the settlement of the partnership accounts, and this defence which would have been good against Dorsey must prevail against plaintiff who is in no

The endorsee or holder of a note who takes it after maturity holds it subject to all the equities existing between the original parties.

So where S. makes his accommodation note to D. to enable him to raise funds with an understanding that the latter was to pay it, if he used it, and he passed it to the plaintiff after it was due, in his action to recover of the maker he was non-suited.

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The judgment of the Commercial Court is therefore affirmed with costs.

18L 122
 44 1049

18L 122
 46 677

18L 122
 50 1257
 51 1725

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF

NEW ORLEANS.

The right to future *alluvial* formation or *batture* is a *vested right*; inherent in the property itself, and forms an essential attribute of it; resulting from natural law, in consequence of the local situation of the land to which it attaches.

Cities may acquire *jure alluvionis*, but it must be as owner of the front, or as *Riparian* proprietor; for the *alluvion* is but an accessory to the principal estate or land.

There is nothing in the Roman law which restricts the right of *alluvion* to particular localities, or portions of land, having particular names; but the right depends on the question whether the land had fixed and invariable limits, or a natural boundary on one side by a water course.

The Jesuits' plantation, out of which the *locus in quo* arises was originally entitled to the alluvion or batture in its front. The mere act of incorporation of the city in 1805 changing the name of this property from *rural* to *urban*, neither made the city a front proprietor, so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion.

The onus or burden consequent on the right of alluvion is *natural*, not civil; it is a risk arising from the exposed position of the land, not the expense of making embankments; for the right of alluvion exists on streams which do not overflow.

The public, through the agency of the corporation, has the sole use of the levee and of the bank of the river; and the front proprietors cannot extend the levee without the consent of the corporation, which in the meantime has the right to make all improvements for rendering it useful to the public and favorable to commerce.

The French government in laying out the ancient city of New-Orleans left an open space between the front row of houses and the river, marked *quai* on the

plan, which was a dedication of this space to public use, and it became there-
by a *locus publicus*.

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If in laying out the Faubourgs, the ancient proprietors of those riparian estates, had left an open space between the front street and the river, marking it as a public place on the plan, it would have amounted to a dedication, if accepted by the public.

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But none of the plans show any indication of Madame Delord and her vendees having ever dedicated the front of her property on the river to public use: on the contrary she continued to exercise acts of ownership as a *riparian proprietor*, and was required by the city ordinance of 1830 to keep up the levee in front as such.

Garland, J.—The right of alluvion is not based exclusively on the principle of being subject to the expense and burden of keeping up roads and levees. The Roman jurists say it is a mode of acquiring property by natural law; that it is just the advantages of the thing should belong to him who supports its disadvantages.

The plan of Madame Delord, leaving an open space between New Levee street and the river, was not a dedication of this space to public use. There was nothing marked or written on it indicating an *intention* so to dedicate it.

There is no particular form, necessary to a dedication of land to public use.— But it requires the assent of the owner and the fact of its being used for the purposes intended.

Martin, J., dissenting.—Where the plan of a City or Faubourg fronting on a navigable river, or the sea, has an *open space* between the front row of houses or street, and the water, it becomes part of the port, and is a *locus publicus*, dedicated to public uses, without any other designation whatever.

The Batture which formed in front of the Faubourgs of the City of New Orleans, after their incorporation with the City, became the property of the City, and not of the front proprietors.

In countries governed by the civil law, the ports or landing places of cities situated on navigable rivers, lakes or the sea, are *locus publicus*, in which individuals have no right of property.

The plans of Faubourgs Delord and Saulet laying off these plantations into City lots and squares, divested the owners of all interest, except in the lots and squares sold to individuals, &c. All the rest was dedicated to the public. The land or space between New Levee street and the river became a *locus publicus*, destined to the *public use*. This dedication required no further evidence than the plan and the use of these places by the public.

This is an action in which the second Municipality claims title to and the possession of a parcel of ground lying in its front, within the limits of Faubourgs Delord and Saulet, bounded in front on Front street, on the upper line by Roffinac

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street by property or lots separating it from Benjamin street; and in the rear by New Levee street, formed by alluvion from the Mississippi in front of said Faubourgs, and now in the possession and claimed by the Orleans Cotton Press Company.

The plaintiffs allege that this alluvion or Batture was formed long since the said Faubourgs were incorporated into and brought within the limits of the City of New-Orleans by the act of incorporation in 1805; that the title to this property became vested in the corporation for the sole and exclusive use and benefit of the public, and is now by law vested in Municipality No. 2, within whose limits it is situated; that the Orleans Cotton Press Company have proceeded to build and erect on said ground, large establishments, buildings and stores for pressing and storing of Cotton, &c.; and have appropriated the same to their sole and exclusive use. They pray judgment declaring that the title to said property *is vested in them*, for the use and benefit of the public, and that the possession thereof be decreed to them,

The defendants first pleaded the peremptory exception of *res judicata*, founded on a suit of Henderson et al. *vs.* Mayor et al., in 3 and 5 La. Rep., 563, 416.

For answer, the defendants pleaded the general issue; and denied specially that the plaintiffs had any right, title or legal claim to the premises whatever. They further aver that they are riparian owners of the alluvion or Batture which has by increase and accretion attached itself to their front property, situated in front of said Faubourgs Delord and Saulet; that they own and possess said property, originally by concession from the King of France; and that it has descended by various conveyances together with all the rights to increase or Batture, and is now vested in them; that they cannot be divested of their said property without their consent and without just and previous indemnity:—and finally, if the act of incorporation of the City of New-Orleans, in 1805, under which the plaintiffs claim title, divests them of their title it is in viola-

tion of the Acts of Congress creating the territory of Orleans, the treaty of cession, and repugnant to the constitution of the United States; and that so far as said act affects or divests them of their right and title to the premises, it is *null and void*. They reiterate that they are Riparian owners, and have been burthened with the charges and duties, of such.

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Upon these pleadings and issues the cause was tried.

The Parish Court sustained the plea of *res judicata* so far as respects the ground or square, on which the Cotton Press stands:—Being of opinion that the defendant's claim to it was confirmed in the case of Henderson et al. vs. Mayor et al. The evidence of the case consisted of various plans and title deeds from Madame Delord and others, from and to whom the original property passed, from the time it was laid off into town lots in 1806, 7 and 8, down to the present owners. In February, 1806, Madame Delord caused a plan to be made and laid off of her plantation, lying immediately above the Faubourg St. Marie, into city lots; making it a continuation of that Faubourg. In front of the outer range of lots *on the* Batture was Front or New Levee street; leaving still a space between it and the river Mississippi or water's edge. It is the Batture or alluvion that has accrued out-side of the street and the then levee, that forms the object of the present contestation or the *locus in quo*.

The defendants produced evidence to show that they and those under whom they claim, always claimed and exercised acts of ownership over the alluvion or Batture that accrued in front of their property.

The plaintiffs' demand to be considered in the place of riparian owners; that the *open space* left between Front street and the river in 1806, as represented on the plan of Madame Delord, became public—a *locus publicus*, and vested in the corporation, under the act of 1805, as a public place, to be administered for the use of the public; and further, that all the accretions or alluvion which formed in its front, was public; partaking of the same character. Of this opinion was the

EASTERN DIS. Parish Court. There was judgment decreeing the title to the
April, 1841. space of Batture now vacant unoccupied, lying front of the
MUNICIPALITY Cotton Press, situated out-side of the levee and road estab-
NO. 2. lished by the corporation, to, and vesting it in the plaintiffs for
VS. *public use and purposes.* The defendants appealed.
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Mazureau, for the plaintiffs, maintained that the question in this case is—Whether the alluvion, which was covered by the river at the highest stage of its waters, lying outside the *levee street*, known by the name of New Levee street, at the time when the plantations Delord and Saulet were erected into faubourgs, belongs to the public or to the Cotton Press Company?

The facts requisite to be known, and the truths of which it is necessary to be satisfied, for the purpose of coming to a satisfactory conclusion, by a correct application of the law, are the following :

1st. The plantations Delord and Saulet were portions of the ancient plantation of the Jesuits. And it is well known that according to the acceptation of the term in Louisiana, *plantation* means a rural estate, that is to say, situated beyond the limits of a town. It is equally well known, that a rural property, lying upon the bank of a stream or river, and having no other boundary on that side, is called a riparious estate. Such was the Jesuits' plantation. Such were the plantations Delord and Saulet, as forming parts of it.

2d. In 1805, by a law of the territory of Orleans all that tract of country included within the following boundaries was erected, incorporated and continued to be a city, by the name of New Orleans, to wit :

On the north by Lake Pontchartrain, from the mouth of Chef Menteur to the bayou Petit Gouyou to the place where the upper line of the plantation, on the west by the bayou Petit Gouyou, called Mazange, (since of Norbert Fortier,) passes ; from thence along the line of the plantation of Forcel to the

Mississippi, and across the same to the canal of Mr. Harang, &c.

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3d. This corporation was created by the title of "The Mayor, Aldermen and Inhabitants of the city of New Orleans."

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4th. For the administration of the property and affairs of the city, the same law created a Mayor and fourteen Aldermen, the latter to be elected by the citizens; for which purpose the territory of the city was divided into seven districts.

5th. The sixth district embraced the plantations Delord and Saulet, and extended to the upper limits of the city.

6th. By the act of incorporation, the City Council was empowered to impose taxes upon every description of property, moveable and immoveable, situated within the limits of the city, for the purpose of raising the sums necessary "for lighting, cleaning, paving and watering the streets; for supporting the city watch, the levee of the river, the prisons and other public buildings, and for such other purposes as the police and good government of the city required. Provided, that no real property within its limits, and not situated in any part thereof, which shall at the time of imposing such a tax, be laid out into streets, shall be taxed for the maintenance of lights, of the city watch, or for watering and cleansing said streets."—2 *Moreau's Digest*, p. 111

7th. In 1807 or 1808, the plantations Delord and Saulet, the former of which adjoined the Faubourg St. Mary, were divided into streets, squares and lots.

8th. At that period, there existed and passed between the enclosed lands of Mme. Delord and Mr. Saulet and the river, a *levee street*, being the continuation of the *levee street* running along the front of the Faubourg St. Mary, still existing and known by the name of Tchoupitoulas street.

9th. There existed also, outside of this *levee street*, a certain strip of ground, known here by the name of *batture*, which was covered by the river at the annual high stage of its waters ;

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a part of which was susceptible, by the construction of a new levee, of being occupied by the owners of the original estate.

10th. In the exercise of their riparian and still rural rights, and wishing to take possession of and occupy as their private property the portion of the batture capable of being owned by reason of its elevation, Mme. Delord and Mr. Saulet constructed upon it, in advance of Tchoupitoulas street, a new levee, to serve as a street or road ; which they called "New Levee street."

11th. This being done, they divided the whole of this accession into streets, squares and lots, in the same manner as their principal properties ; leaving outside the new levee, what remained of the batture, which being very low and of small extent, continued as before to be the bed of the river.

12th. In this manner their estates were enlarged by all the space contained between the two streets ; and the lots formed from this accession were sold by them in the same manner as those forming their primitive estates. They had the right so to do ; no one contested it.

13th. In 1810, the legislature of the Territory of Orleans, passed a law by which it was enacted:

" Section 1. That the keeping and repairs of the levees of every real property, situate on the banks of rivers, which have been or shall be for the future divided into lots, and which shall not have been annexed to a city already incorporated, or which shall not have been erected into a city, borough or village, and as such incorporated, *shall be at the charge of the whole of the proprietors of the lots* situate on the said real property ; and for that effect the parish jury shall cause to be valued every one of the said lots ; and the amount to be paid by every one of the proprietors for the keeping and repairs of the said levees, shall be in proportion to the valuation of the said lots ; provided, that in the valuation of the said lots by virtue of this act, the same shall be valued without including in the said estimation the value of any part of the improvements which might have been made by the owners on the said lots.

“Section 2. That the repairs of the roads, streets, or avenues on the said real property, divided into lots without having been incorporated or annexed to some city, borough, or village already incorporated, shall be made by the proprietors of the lots in front whereof the said roads, streets or avenues are to run conformable to the plan of the said real property, situate on the banks of a river and divided into lots as aforesaid.”

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14th. In September, 1812, the limits of the city were changed, or at least narrowed, by law. The upper limit was reduced to the Nuns' plantation (at present the faubourg Annunciation.)

15th. The same law made a new division of districts, and enacted that the settlements between the suburb St. Mary and the Nuns' plantation, should form the 7th ward and elect one alderman.

16th. In March, 1818, the upper limit of the city was again extended and carried up to the lower limit of Miss Macarty's plantation, and the space between this limit and the preceding was constituted the eighth ward.

17th. From and after the year 1812, the seventh ward always elected and sent an alderman to the city council, and as I have before stated the plantations of Delord and Saulet were comprised within its limits.

18th. It is since 1812, that the defendants or their predecessors purchased that portion of the batture, which after the creation of the original property into faubourgs and the accession of the alluvion, I have before mentioned, remained outside the *levee street* called New Levee street, was covered by the water at the high stage of the river, and formed a part of its bed.

19th. This space taken from the batture, and consequently from the bed of the river, embraces, by the defendants' statement, the entire front of the faubourgs Delord and Saulet, by an irregular depth.

20th. The cotton press, erected on this batture, occupies a depth of about three hundred feet, being in proportion to the

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total depth of those faubourgs, as one to nineteen nearly, or in other words, as a narrow strip of list to a piece of cloth.

21st. Since 1808, the period at which the faubourgs Delord and Saulet were created, up to the date of the defendants' purchase, and from thence to the present time the batture has been continually increasing, and extending itself towards the opposite shore, by reason of the deposits made by the river in its high stages.

22d. In 1831, they pretended to have a right not only to the alluvial soil upon which their cotton press is built; but also the remainder of the batture, which by their own admission, formed a part of the port, and in consequence they instituted suit against the Corporation, denying its right, either to remove from the batture the nuisances which obstructed the free use given by law to the public, upon all the part situated beyond, as well as upon the banks of the river; to construct a new levee, or to make a road at its foot; except in consideration of an indemnity previously granted and paid.

23d. The judgment rendered in that suit maintained the corporation in its right to clear the batture and make a new levee, but decreed that it should pay an indemnity for the space to be occupied by the street.

24th. Since the rendition of this judgment, the obstructions on the batture have been removed, and a levee has been made by the corporation, which serves, at the same time, as a street, throughout the whole front of the faubourgs Delord and Saulet.

These facts being known, we will again state the question to be examined.

Does the batture upon which the cotton press is built, and that which lies outside the levee constructed by the corporation in 1831, belong to the city; or to the defendants?

In other terms: does this batture belong to the nine individuals composing the Cotton Press Company, and which, admitting their title to be valid, occupies the whole front of the two faubourgs, by a depth of perhaps three hundred feet? or

does it belong to the public, to the city, of which many hundreds of citizens, owners of houses and lots, situated in these two faubourgs, of which the cotton press occupies the whole front, form part?

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Such is the question I am about to examine; I will first state the general rule:

“The alluvions belong to the riparian proprietors. This rule is founded upon the equitable principle, that he who is exposed to loss, should profit by the gain.”

I. It results from these facts, that the Cotton Press Company is not a riparian proprietor of the description of those, who are exposed to loss by the inroads of the river. If the river detaches suddenly, or insensibly and successively, certain portions of the soil, so that in the end the levee and road disappear, the Orleans Cotton Press Company, will not be bound to furnish another road and levee to the public, in the place of those so destroyed. It is nevertheless true, that the Jesuits, and also the persons who purchased parts of their plantation, were obliged to furnish the road and levee; and that the Cotton Press Company, allege themselves to be in their place and stead, and like them riparian proprietors.

But, when in 1831, the city wished to exercise, upon this, their self styled riparian property, the right of servitude, *via et iter*, created in its favor by law; what was the conduct of the immediate authors of the Cotton Press Company? They refused to permit the servitude, and a solemn judgment declared, that they owed it not. What consequence results from that this? they were not riparian proprietors. Had they been riparious owners of a rural estate, they would not, and could not, have been allowed to dispute the right of servitude sought to be exercised by the public. The court would never have admitted their denial. It would never have declared that the public could only take the road by paying for it. It did so decree in a most positive manner; and in thus deciding, declared that they possessed not the rights, were not in the place and stead of the Jesuits; who were bound to furnish a road

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and levee; and, consequently, that they possessed not the kind of property that could acquire by alluvion; for, once more, the accession by alluvion accrues only as a compensation for the loss and charges to which the riparian owner is exposed.

“Qui sentit onus, sentire debet commodum, et e contra.”

II. In the first place, I maintain, that by law, the alluvion only accrues to the owner of a rural estate bordering on a river.

In the second place, that the alluvions formed on the shores in front of, and united to cities and their suburbs, belong to those cities. I commence with the first of these propositions:

The alluvion only accrues to the owner of a rural estate, bordering on a river.

The text of our Civil Code, art. 501, is as follows:

“The accretions, which are formed successively, and imperceptibly to any soil situated on the shore of a river or creek, are called alluvions.

“The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or creek, and whether the same be navigable or not, who is bound to leave public that portion of the bank (*le chemin de halage*) which is required by law for the public use.”

To any person who has studied the civil law of Louisiana, and knows the source from whence this text is drawn, as well as the legal acceptance of the term “*fonds riverain*,” (*riparious estate*) this text is sufficient to form a decision on the conflicting claims of the city and private individuals, owners of lots, which are only portions of the estate (*fonds*) upon which the city is founded (*fondée*.)

He will entertain no doubt, that the city, and not the owners of these lots, is the riparian owner.

There is an additional reason to strengthen an opinion, which nothing should shake; it is that if the river carries

away its bank and the road bordering it, a new bank must be left, and a new road constructed for the use of the public.

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But the owner of a lot or site in front of that city, which is nothing more than a measured and limited parcel of its domain (fonds) cannot be obliged, by law, to make a gratuitous surrender of his lot or front site, for the purpose of furnishing a new bank and road for the public use. It is upon the city, as a body and community that this charge is imposed; and which it would be obliged to acquit, by purchasing the lots, on which the houses forming the front of the city, are built. It would have no other resource; and the price of this indispensable acquisition, since the bank and road must be furnished, would have to be paid out of the taxes and other revenues contributed by, and belonging to the citizens collectively.

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III. A superficial observer would say: the lot upon which my house is built, situated in front of the city, is an estate (fonds.) Between it (ce fonds) and the river, there is no other estate (fonds,) consequently it (ce fonds) is riparian. Therefore, if the river, either by degrees, or suddenly, carries away the bank, the road and my estate, (fonds) no one will indemnify me. Being, therefore, exposed to the loss, I ought to profit by the accession of alluvion.

To this I reply, that he who purchases a city lot, does it with a knowledge of the fact, because he cannot pretend ignorance of the law; at his peril and risk, because his lot is measured, and has fixed limits; because the road or street, which bounds his lot, does not belong to him, and he has only the use of it in common with every body; and lastly, because he is not personally charged with the keeping and repairs of the road, bank, or levee. Therefore it would be unjust, when protected by the revenues of all his fellow citizens, against the inundations of the river, and only supporting in common with them the expenses of the construction, keeping and repairs of the roads, streets, and levees, that he should alone profit by the alluvion. Because if instead of an accession by alluvion, a loss should accrue by the destruction of the bank,

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levee, and roads, it would fall upon the whole of his fellow citizens, individually and collectively.

If *his soil* be carried away by the river, his fellow citizens, and the whole community would lose, by the same event, all the bank, road or street lying beyond it; and moreover. all the space, besides that formerly occupied by his lot, which would be necessary to replace the bank and road so destroyed, and for the construction of a new levee at such a distance, that in case of a repetition of the accident, they should be exposed less frequently to the same expenses. Indeed I am still at a loss to conceive, after long study and serious reflection, how the defendants could have had the assurance to put forth their present pretensions.

They pretend to say, that they are in the place and stead of Mme. Delord and Mr. Saulet, and also of the Jesuits, and to advance, that they are entitled, to the same rights as the latter.

Yet the Jesuits were owners of a rural estate, having the river for its limits; and Mme. Delord and Mr. Saulet, having purchased portions of that property, were, until the division of their plantations into lots and streets of faubourgs, actually riparian owners of rural estates. Where are those rural properties at the present day? we look in vain for them. They have disappeared by their conversion into urban properties; by the change of a plantation to a city.

You are proprietors of a riparian estate and in the place and stead of Mme. Delord, Mr. Saulet and of the Jesuits, and nevertheless you did not purchase from either of them. But the hundreds of persons who own lots, sold by Mme. Delord and Mr. Saulet, are also in the place and stead of those two persons, and of the Jesuits. Have not they equally as much right, as yourselves to the alluvion? I firmly believe it; for they all purchased, as you did, portions of that large riparian and rural property (fonds) which being exposed to loss, had by law, the right of accession by alluvion. Every portion of that property, has, in proportion to its value, the same charges to support as yourselves; each one ought therefore to enjoy

the same advantages. This is so far true, that the law of 1810, upon which you rely, has divided among all the inhabitants of the faubourg, without distinction as to situation, the charge of the levee, imposed originally upon the Jesuits, and after upon Mme. Delord and Mr. Saulet. Consequently this charge being imposed upon all the inhabitants, upon the public of the faubourgs, the advantage cannot accrue to you alone, to the exclusion of all the others.

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Admit the system contended for by the company, it results, that if the owner of a property bordering on a river, and having a depth of forty arpents, sells the whole of his land, with the exception of the space occupied by the bank, the road, and every thing lying beyond the levee; his vendee will not be a riparian proprietor, and cannot profit by alluvion. Nevertheless, if, instead of an accession by alluvion, the bank, road and levee, should be carried away by the river, the land of the purchaser would become situated on the marginal line of the water, and hereafter exposed to every new loss and destruction that the river might occasion. Should a new road and levee be required from the vendor, he would instantly reply: It is out of my power to furnish them. I no longer hold any property, the river has carried away every thing that I possessed upon its banks. If he be listened to; if this true and incontestable reply is accepted, it becomes clear that it only depends upon the will of every riparian proprietor, to exempt his estate from the perpetual servitude imposed upon it of furnishing a road and levee for the public use; and this by the fact of selling his property, and reserving only the space occupied by the road and levee.

Still, it is indispensable, that a road and levee should be furnished, either by the public, or the purchaser of the land, from which the reserve was made, to supply those destroyed.

But which of the two ought to furnish them? Certainly not the public, for it cannot be thus frustrated in its rights. It must, therefore, fall upon the purchaser, who can in no manner be excused from it. I say, again, that it is not upon a *strip of*

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the land conceded, that the servitude is imposed but upon every part and portion of it. The purchaser would vainly say, that he did not buy a riparian estate ; that the portion of the original estate, which was riparian, or bordering on the river, had been reserved by the vendor, who was alone entitled to the accession by alluvion, and consequently exposed to all losses occasioned by the encroachment of the river. And that in consequence of not being a riparian proprietor, and not enjoying the advantages attached to that quality, he could not be made to bear the losses attendant on it. He would be successfully answered on the part of the public, that the land purchased by him, formed by far the largest and most considerable part of the primitive estate, conceded under the burden of furnishing a road and levee ; that every portion of it is subject to the servitude, and cannot be withdrawn from it; that if he has made an inequitable contract, it is no reason why the public should lose its rights ; that he must seek restitution from his vendor, who had taken advantage of his inexperience, and endeavored to enrich himself at his expense, by reserving all the chances of advantage and profit, without the risk of loss ; that from him he might recover the value of the land required for the road and levee, he will be constrained to make, first, for his own security, second, for that of his neighbors, who are subjected to similar servitudes for his, and the general protection and safety.

IV. It is necessary for the defendants to show that in 1808, the batture outside the levee was “ sufficiently high to be susceptible of private ownership, to enable them to recover and hold possession of the batture.” This was required in the celebrated but disastrous suit of Gravier vs. the Mayor, Aldermen and inhabitants of New Orleans ; 1 *Condensed Martin's Reports*, 454.

Thus it will be perceived that the reason why John Gravier was recognized as owner of the batture in front of the Faubourg St. Mary, was not solely, because there was a batture in front of his brother's plantation at the time of its erection into a faubourg ; but more especially, because that batture

was, at the time, "*of sufficient height to be considered as private property, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier.*"

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Had the court not been convinced by the evidence produced in the suit, that the batture was sufficiently elevated to be considered private property, the pretensions of Gravier would have been repulsed, and the batture would have fallen into the public domain of the city, by the simple fact of the conversion of the plantation into a suburb. But in our case, when a year after the judgment which I have just recited, (which was rendered in May, 1807) Mme. Delord and Mr. Saulet, also erected their plantations into faubourgs, there was a batture outside of Tchoupitoulas street, which served as a levee, the same as before the faubourg St. Mary. Instructed of what they conceived to be their rights, by the decree in favor of Gravier; they took, in front of their respective plantations, all that portion of the batture which was "*of a sufficient height to be considered as private property*"; inclosed it within their domain by means of a new levee and street, which they constructed much nearer to the river, along the whole extent of the front of their respective lands; sold that considerable portion of batture, which formerly extended from the marginal line of the water to the foot of Tchoupitoulas street, into lots; thus leaving outside the *new levee street* the portions of the batture too inconsiderable, or little elevated to be consolidated with the surplus.

These facts being established (and they cannot be doubted after examining the plans and the testimony of Perez and Livaudais, produced by the defendants in the first suit); and supposing that in the present instance, Mme. Delord and Mr. Saulet, were claiming the batture, or that portion of it, which in 1808 was left outside the new levee; would it not be necessary, in order to obtain a judgment, if the jurisprudence be established by that decision of the superior court, for them to prove that in 1808, the batture was "*of sufficient height to be (then) considered as private property?*"

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And here let it be remarked, that in limiting ourselves in this place, to the application of the principles as laid down by the superior court, we, by no means assume the most favorable position for ourselves.

V. At the commencement of the argument, I laid down the general, and with us undisputed principle, that the alluvions belong to the riparian proprietors, But I maintained that the principle was only applicable to the owners of rural estates, "prædia rustica."

I maintained that it did not apply to urban property.

I said that the alluvions on the banks of rivers, within the limits of cities, towns, faubourgs, or villages, belong to those bodies or communities.

To prove this : I made use of the Roman and Spanish laws, from which our own are derived, and which materially aid us in understanding the sense, and correct application of the dispositions of our code.

I here refer to the opinions of *Hulot*, 1 vol. pages 9, 10 and 11; who also cites *D'Aguesseau*, *Cujas*, *Dumoulin*, *Castilhon*, *Bretonnier* and other *French Jurisconsults*, on the excellence and authority of the Roman law. I resume this law as my guide.

I open the *Digest of Justinian*, lib. 41, tit. 1, law 7, sec. 1; and 16th volume of *Pothier's Pandects*, page 157, and I read the following text, of great assistance to the understanding of this discussion, and the source of article 501 of the *Louisiana Code*.

"Prætereà quod per alluvionem agro nostro flumen adjicit, jure gentium nobis acquiritur."

The translation of which is :

"That which a river adds to our field by alluvion, belongs to us by the law of nations."

Little versed in the Latin language, but feeling doubtful whether "*agro nostro*," was correctly translated by "*our field*," I felt disposed to stop. But recollecting that the Roman Digest contains a book or title, appropriated to fixing and

determining the signification of words, I refer to that part, to see the definition and sense of the word "*Ager*."

Digest, lib. 50, tit. 16, l. 27, de verborum significatione, I read :

"*Ager est locus qui sine villa est.*"

Here I am stopped by the word "*villa*;" by reference to *Pothier's Pandects*, vol. 22, page 42, I find "*Ager*" vide infra "*fundus*." I look for the word "*Fundus*," and at page 154, I read :

"*FUNDUS*," *ager, possessio; prædium, locus.*"

"*FUNDUS*," *est, omne quidquid solo tenetur.*"

At page 156 I find :

"*AGER*," *est, si species fundi ad usum hominis comparatur.*"

"*Ager*, is a portion of land prepared (cultivated) for the support of man."

"*Ager est locus qui sine villâ est.*" Still the same thing: What then is the meaning of "*villa*?" The French translation runs: "*Ager est un lieu sans maison de campagne.*"—" *Ager*, is a place without a country house;" therefore, "*without a country house*," is the translation of "*sine villâ*." I look above, and find that this is the correct translation. In fact, I read in the preceding paragraph :

"*FUNDI appellatione omne ædificium et omnis ager continentur. Sed in usu urbana ædificia, ædes; rustica villæ dicuntur.*"

"The word '*Fundus*' means every kind of property in lands and buildings, but by custom, houses in a town are called '*ædes*' and those in the country '*villæ*.'"

I am, therefore, better instructed, and I translate the law of *Ulpian, ff.* "*Ager est locus qui sine villa est*," by the words: "*Ager*, is a place without a country house;" and I say that the translation of the law "*Preterea quod per alluvionem agro nostro flumen adjicit, jure gentium nobis acquiritur*," given in the 16th volume of *Pothier's Pandects*, in these terms :

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“Ce que le fleuve ajoute à notre champ, par alluvion, nous appartient par le droit des gens;” (“that which a river adds to our field, by alluvion, belongs to us by the law of nations,”) is an exact and correct translation.”

I no longer feel any doubt; but wishing to fortify my position, I refer to the title of the Partidas, del significamento de las palabras, and I read law 8, tit. 33, Partida 7:

“Otrosi decimos, que *ager*, en Latin, tanto quiere decir, en romance, como campo para sembrar, en que no ha casa ni otro edificio, fueras ende alguna cabaña o choça par cobrar los frutos.”

And, in note 3, of Gregorio Lopez, upon that law, I find:

“Adde lex *ager* ff. eod. indè *agricultura*, quia omnium rerum ex quibus aliquid acquiritur, nihil melius, etc.”

I was formerly wont to believe that the word *Agriculture*, was derived from *Ager*, but I am now still more firmly convinced of it, since my opinion is supported by that of a man like Gregorio Lopez. Thus enlightened, I return to my text “*prætereà*, etc.,” and, seeing more clearly than ever, that it only speaks of a *field*, as the species of property which obtains an increase by alluvion, I conclude that urban or city property, does not profit thereby, according to the maxim:

“*Inclusio unius est exclusio alterius.*”

If the condition of urban property, was similar to that of rural; if the *prædia urbana*, were subjected to the same charges and servitudes, and exposed to the same risks as the *prædia rustica*, it would be difficult to account for this disposition, which favors only a certain description of property, which, in appearance, at least, protects only certain riparian estates; but on the one hand, I see that town lots, *prædia urbana*, are measured, and have their size determined by fixed and immutable limits; and, on the other, that the *prædium rusticum*, that is to say the riparian *ager*, has no fixed and determinate limits, except those which it derives from nature, or its position on the banks of a river, which may destroy a portion of its soil. I further see that the *prædium urbanum*,

is not bound to furnish, either a street, road or levee, to the public; that, on the contrary, the *prædium rusticum* is obliged, by the law of the country, to furnish at least a tow path; and, according to the primitive title of concession, a high road and levee along its whole front, upon the bank of the river or stream. I observe that no *prædium urbanum*, has either a river or stream for its natural or conventional boundary; but I find on the contrary, that every *prædium rusticum*, or *ager*, (which is a species of *prædium*,) called riparious, receives that denomination, because it has a river or stream for its extreme limit. I observe that the *prædium urbanum*, not being the *principal* of which the street is the *accessory*, if the latter be destroyed, the loss will fall upon the public, and not on the urban proprietor. I see that such is not the case with the *prædium rusticum*, called *ager*, which in the event of the destruction of the road and levee, which the owner is obliged to make, by the encroachments, is still bound to furnish others to the public. I see, moreover, that in every possible event, all the risks and charges have been laid upon the *prædium rusticum*, while the *prædium urbanum* is only subject to the inconveniences resulting from the laws, which have for object the regulation of good neighbourhood, and the convenience of the citizens at large; and, I therefore conceive, that the law cannot be the same for both species of property.

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If all things, if all the burdens and risks, were alike, I would say that the law of alluvion should apply to a city lot, as well as to a country estate: I would invoke the principle: “*Ubi est eadem ratio, eadem est et lex.*”

VI. I open then the Code of Alonzo the Wise, which, putting aside some slight imperfections, attributable solely to the age in which its immortal author lived, is still one of the most splendid monuments of human wisdom.

Many years have not elapsed since we were governed by that code, not enough, at least, to prevent us from feeling the evil which its abrogation has inflicted upon our legislation.

In this cause, it will be of so much the greater service to us,

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April, 1841. which it now asserts, under the empire of that code.

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Law 26, title 28, Partida 3, enacts:

“Crecen los rios à las vegas de manera que tuellen e menguan a algunos en las heredades que han en las riberas dellos e dan, e crecen a los otros que las han de la otra parte. E porende decimos, que todo quanto los rios tuellen à los homes poco a poco, de manera que non pueden entender la cantidad dello porque no lo llevan ayuntadamente, que lo gañan los señores de aquellas heredades, à quien lo ayuntan, e los otros a quien lo tuellen, non han en ello que ver. Mas quando acaeciesse, que el rio llevase de una heredad ayuntadamente, asi como alguna partida della *con sus arboles*, o sin ellos, lo que asi llevase non gañan el señorío dello aquellos á cuya heredad se ayunta; fueras ende, si estuviesse y por tanto tiempo que raigassen los arboles en las heredades de aquellos á quien se ayuntasen; ca estonce ganaria el señorío dellos el dueño de la heredado raigassen, pero seria tenuto de dar al otro el menoscabo que recibió porende, segun el alvedrio de omes buenos, et sabidores de labores de tierra.”

This law, as is seen, agrees with that of the Roman Digest, which I have read; I mean the law “*Præterea*.” That there might be no doubt upon the subject, Gregorio Lopez, has so stated it, in his note No. 1, upon that law.

Has not the word “*heredad*,” employed by the legislator in that law, the same meaning in Spanish, as the word *ager*, made use of in the Roman law *præterea*?

I should have no hesitation in deciding for the affirmative.

This law, which was only abrogated in 1828, and must therefore be our guide in the present instance, since the rights now claimed by the public were acquired under its influence, most certainly gives the right of increase by alluvion only to riparious rural estates. This must be conceded by every person, not paid to say the contrary. In the terms it employs, there is neither obscurity, doubt or ambiguity, to any one who understands the language in which they are written.

Therefore, if, as I believe, I have firmly established by reason, common sense and sound law, it is impossible for the owner of a *town lot* to acquire by alluvion, how can the public fail in this cause? by what magic can the Cotton Press Company succeed? unless by a *tour de force*, which perhaps may not be beyond the resources of the genius of our age, it succeeds in proving that a faubourg is an "*Ager*," "*Una heredad*," an urban property; and that an "*Ager*, that *Heredad*, that *urban property*, belong to it.

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Now or never is the time to show, not only that "the whole is contained in the part," but also that truth and error are one and the same thing. In case I should have omitted something, when I maintained that the ground (*fundus*) upon which a city is built, belongs to that community, body politic, and aggregation of men, which we term Corporation; let me be permitted to return for an instant to that subject.

To build a city, town or village, it is necessary, I conceive, to have, first the ground (*fonds*.)

This (the *fundus*) being had; the town is built upon it. Thus built the town becomes inhabited, and the inhabitants, for the purpose of ingress and egress to and from their houses, for attending to their business both in and out of town, for access to the river upon the borders of which it is situated, for returning therefrom, and for that of travelling over the whole front of the town, if their business requires it, have streets, roads, issues and avenues, which are no more than parts of the ground, foundation (*fonds*) upon which the town is seated.

What is the nature of this property (*fonds*) now? Is it not an urban property?

To whom does it belong? Necessarily to the community called a city, to that aggregation of men who inhabit it. Each of them is proprietor of the lot on which his house is situated, and all possess in common the streets, roads, issues and avenues, to the use of which every stranger, whose affairs lead him to the town, is in like manner entitled.

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The destination of these public objects, the use of which is granted to every one, cannot be changed by the individual will of any person. It can only be done by the public, and for its interest and greater advantage. It, therefore, seems to me an irresistible conclusion, that the soil (*fonds*) belongs to no individual person.

VII. It is admitted the *ground* (*fonds*) on which the Faubourgs Delord and Saulet were laid out into lots was *riparian* while it was *rural*, and it did not cease to be so in becoming *urban*; consequently the rural proprietor disappeared and gave place to the urban proprietor, which is the *Public*; the successor of the individual founder of this part of the city, who was riparian owner.

The shore of the river in front of rural property belongs to the owner of the land, although the public has the use of it; but will it be said this is the case of the shore in front of a *town lot*, which is urban property? Certainly not; for the public as owner of the ground (*fonds*) of the front lot is a small portion, is the riparian owner; and consequently the shore in front of the city, belongs to the public, *i. e. the city*. The same should be said of the public road running along the river's shore. The Cotton Press Company is therefore not a riparious proprietor, capable of acquiring by alluvion; see Partida, 3, tit. 28, law 6, on the subject of the public road and the *port*: also *Pandects*, law 59, *de verborum significatione*; Lex. 7, tit. 12, lib. 8, Code; Curia Phil., lib. 3, cap. 1, Nos. 35 and 37.

VIII. Nothing is more unreasonable and unjust than that an individual who happens to own a front lot, and has contributed only his bare proportion of taxes, for the construction of wharves, levees, streets, and the improvements of the port or harbor, should become the exclusive proprietor and immutable possessor of the alluvion which has become part of the port; yet such are the pretensions of the Cotton Press Company.

But there is a positive law which gives to towns and cities the alluvion which are formed in front of them. This is to be

found in Partida 3, tit. 28; law 6 and 9. See also the case of **EASTERN DIS.**
Packwood vs. Walden, 7 Martin N. S., 90. Pandect's lib. **April, 1841.**
 41, tit. 1, law 16, de acqr. rer. dom.

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IX. The numerous counsel for the defendants with so much learning, skill and eloquence, seem to direct their principal arguments against the pretensions of the plaintiffs, and to persuade the court and the public that there is no foundation for their claim to the alluvion.—Because say they, the alluvion belongs not to cities, but to the owners of riparious lots.

2d. That neither the Roman or Spanish laws give the alluvions to the owners of rural estates only; because *ager* in the former, and *heredades* in the latter law are generic terms, by which are understood urban as well as rural property, and that, as by both of them the alluvion is given to the riparian proprietor, it makes no difference whether his property be situated in the country or in a city. 3d. That the Roman law "*in agris limitatis*," was made only in relation to lands taken from the enemy, and afterwards divided and apportioned amongst the soldiers; that, consequently, it is inapplicable to other objects. 4th. That the word ARENALES does mean ALLUVION. 5th. That the law of the Partidas, which treats thereof, does not give the ARENALES to cities, but only enumerates them among the things which cities may acquire. 6th. That the ARENALES belong to the PUBLIC and not to the cities, unless they be expressly and specially granted and conceded to them. 7th. And, lastly, that the faubourgs Delord and Saulet were not incorporated by the act of 1805, but by a deliberation of the City Council in 1835; and, that consequently, the alluvion formed and created before that period cannot belong to the city.

Let us assail the first position.

1st. The alluvions belong not to cities, but, on the contrary, to the riparian owners.

If this position were maintainable; if it were supported by reason or law, the triumph of the Cotton Press Company would be assured.

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But I have no knowledge of any thing that could lead me, or any other person, to believe that reason or law lend their support to a proposition so levelling.

Let us not go out of our actual legislation, let us confine ourselves within the textual dispositions of our Civil Code, and we shall there find the refutation of this proposition.

In truth, I believe what I have already said is sufficient to establish it without any further doubt.

But, not to stop at the principle laid down in the commencement of our article 501, which says,

“The accretions, which are formed successively and imperceptibly to any soil, situated on the shore of a river or creek, are called alluvions;”

A principle from which, I believe, I have deduced an argument that is incontestible;

Let us take up the disposition which, in the same article, declares to whom the alluvions belong:

“The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or a creek, and whether the same be navigable or not, who is bound to leave public that portion of the bank, (*le chemin de hâlage*) which is required by law for the public use.”

These two dispositions existed in the old Code, page 107, art. 18, and 129, art. 12 and 13.

It is evident that these two dispositions, so clear and free from ambiguity, are only applicable to riparious proprietors of rural estates, and not to those whom it is thought fit to call riparious owners of lots situated in a town.

The obligation “of leaving to the public that portion of the bank (*le chemin de hâlage*) which is required by law for the public use,” is imposed on the **RURAL** and not on the **URBAN** proprietor, because the land of the rural owner, has no limit but the river, and because the bank of the river belongs to him. *Civil Code, art. 446, Partida 8, tit. 28, Law 6.*

It is not imposed on the urban proprietor, because his lot is circumscribed by limits beyond which he has no right of pro-

perty ; because the streets and roads, by means of which he has ingress and egress, do not belong to him, but, on the contrary, to the public ; because his property, being limited, does not extend to the river ; and because the bank of the river does not belong to him. Is it not, or at least would it not be absurd to talk of a tow-path, (*chemin de halage*) upon the bank of a river, in front of a city, which has a port ?

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Can a tow-path (*chemin de halage*) exist in a port ?

The shore of a port is bounded by a quay, at which vessels moor, load and unload their cargoes. Must the hundreds of ships which, for six or eight months in the year, fill our port and moor at our quay, slip their moorings and move from that quay, for the purpose of leaving the tow-path (*chemin de halage*) to the enjoyment of skiffs and other small craft ? It would be too absurd to suppose such a thing.

Were it necessary to add any further remark, it would be well to recollect what I said, and established at the opening of the cause, to wit : that the quays belonged in common to the inhabitants of the cities.

But what is a quay ?

Ferraut's Dictionary, *verbo* "*Quay*."

"*Quay, s. m., a levee made between the river or waters of a port, and the houses, for the convenience of passage, and to prevent the overflow in high tides.*"

Trevoux's Dictionary.

"*QUAY, s. m., a construction of stone along the borders of a river, for the convenience of passage, and also to prevent it from inundating the land, and to preserve it in its bed.*"

.
" *Some authors extend the signification of this word to dykes and roads.*"
.
.

"*QUAY, in marine terms, is a space upon the shores of a port, for the loading and unloading of merchandize.*"

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Dictionary of the Academy, *verbo* "Quay."

"QUAY, s. m., in a city or town, a levee made between the river or waters of the port, and the houses, for the convenience of passage. The shore of a seaport, which serves for the loading and unloading of merchandize."

These definitions, all similar to each other, confirm what I have just said with respect to quays, and consequently their destination is incompatible with the existence of a tow-path (*chemin de hâlage*.) It is, therefore, correct to say that the 501st article of our Code, when speaking of alluvion, and saying that it "belongs to the riparious proprietor, on condition of leaving *le chemin de hâlage*," does not include the urban proprietor.

It does not include him, because, I repeat it, the *quay* (which is the bank) belongs to the city, which is the riparian proprietor. It is useless further to discuss this point. It cannot be sustained by the Cotton Press Company.

2d. We will, therefore, proceed to the second part of the defence.

"That neither the Roman or Spanish laws give the alluvions to the owners of rural estates only, because *ager* in the former and *heredades* in the latter law, are generic terms by which are understood urban as well as rural property; and that as by both of them the alluvion is given to the riparian proprietor, it makes no difference whether his property be situated in the country, or in a city."

This learned proposition is about as solid as that which I have just examined. To reduce it to its just value, it would be sufficient for me to reply, at least as far as relates to the *Ager* of the Roman law: "You vainly pretend that it is a generic term by which is understood urban as well as rural property. Every thing of this kind which you have learned from the *American Law Journal* is but a thesis, supported by the aid of mutilated citations, in the interest of a suitor seeking to justify an erroneous judgment at the tribunal of public opinion."

Of what assistance can that clever, ingenious and well-written work be to you, when the Roman law has itself fixed and determined the meaning of the word *Ager*? All the dictionaries in the world, and even the *Gradus ad Parnassum*!!! cannot make the law different from what it is.

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I am very ready and willing to believe that Calvin and your other authorities understood Latin; but I also conceive that the authors of the Roman Digest, who tell us that *ager* means a field, were equally well acquainted with *their own* language.

And when a law has fixed and determined the sense and meaning of words, from whence does the compiler of a dictionary derive his authority to change, to extend, or restrain their signification. Has he succeeded to the power of the legislator? Is he intrusted with the revision and correction of the laws? The authors of dictionaries have a right to our confidence, esteem and gratitude, by their labors; but those who think, or affect to think, that their DEFINITIONS OF WORDS form authority, and that, of a nature superior to those, which for the interest and as a guide of all men, the law in its wisdom has given as well to the suitor as to his advocate, to the advocate as to the judge, display an extreme of *bonhomie*, which borders on downright imbecility.

And is it not in the Roman Digest, at the title "*De verborum significatione*," that the definition of the word "*Ager*" is found?

Alphonso the Wise, has likewise given it, in his Partidas, at the title "*Del significamento de las palabras*." He therein says in the clearest language, that *ager*, means "*CAMPO PARA SEMBRAR, en que no ha casa ni otro edificio, fueras ende alguna cabaña o choça para cobrar los frutos*."

But it was under the reign of these laws of the Partidas, that the alluvion, at present in question, has been formed, and the rights of property now asserted by the Municipality, acquired.

Can you oppose them by your *Gradus ad Parnassum*?

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You may take, if you will, this *Gradus* to climb into Parnassus, but if you would earn a niche in the halls of Themis, be guided by the law and those who have expounded it.

When the law has not fixed, defined and determined the sense of the words it employs, nothing can be more reasonable than to refer to dictionaries to ascertain it: but when it has done this, to it alone we must have recourse. It has no need of the approval of Lexicographers to support it in the exercise of its authority; nor does it prevent learned men from enlightening us, when it has not itself taken that care, relative to the expressions it employs: such at least is my opinion.

But if I am deceived, and it be necessary, that the law, in order to be esteemed as such, should receive the sanction of dictionary makers, I shall not be much embarrassed to find authorities.

I refer to Noel's Dictionary, (Latino-Gallicum) and find: " 'AGER,' *champ*, (field,) terre labourable, (tillable land,) *fonds de terre* (landed property)."

And again, Boudot's Dictionarium Universale Latino-Gallicum, " 'AGER,' *champ*, *fonds de terre*; héritage, terre labourable."

" Agrum, novare, iterare, tersiare. Donner la première, la seconde, la troisième façon à un *champ*: to give the first, second and third dressing to a field."

If further support be necessary to enable the law to stand, I refer to *Pothier du Droit de Propriété*, page 152, No. 157.

" 159. Par notre Droit français, les alluvions qui se font sur les bords des fleuves et des rivières navigables, appartiennent au roi, &c."

See also Partida 3, tit. 28, law 26, where the word *heredad* is employed and the meaning disputed.

3. Let us examine the third ground of defence.

" That the Roman law *in agris limitatis*, was made only in relation to lands taken from the enemy, and divided among the soldiers; and that consequently, it is not applicable to our case."

This is erroneous, and all the writers in the world cannot prevent the proposition from being overthrown.

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Let us here recollect what I have herein before said upon the law *in agris limitatis*.

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Certainly, nothing can be more applicable to our case. We find two formal dispositions in that law.

1st. The exclusion of limited fields, from the right of alluvion.

2d. The alluvion given to cities.

Thus, say that your property is a *field*, an *ager*, which is not correct. It is limited, for your titles show it; therefore you could claim nothing, were it even rural. It is useless to tell us, that this law was made for the lands conquered from the enemy, and divided among the soldiers. You may exercise all your sagacity and logic, and you will find nothing of the kind in it. You will find it nothing but this: "It is well established, that limited fields have no right to the accession of alluvion, as was decreed by Antoninus."

Let us stop here, for this is the principle laid down by the legislator; and in it there is nothing about lands taken from the enemy, nor divisions made among the soldiers: thus far you are condemned.

Now, let us continue: What do we see? That Trebatius, who, I repeat, lived more than a century before Antoninus, had said, "that land, taken from the enemy, and conceded under the condition that it should belong to a city, enjoyed the right 'of alluvion,' &c."

Thus it must be felt and acknowledged; that neither the principle laid down by Antoninus, nor the long anterior decision of Trebatius, say that fields, limited and distributed to the soldiers, shall be the only ones, which shall not enjoy the right of alluvion. But it would be necessary that one or the other, should be so expressed for your position to be correct. You might still perhaps be right, if the principle or decision, in question, said, "the limited lands or fields, divided among the soldiers, do not enjoy the right of alluvion, because it proceeds

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We must, therefore, conclude, that this point is untenable.

4. The defendants' counsel contend that *Arenales* does not mean *alluvion*. Two dictionaries are referred to—Connelly and Nuñez de Taboado. These learned authors in their definitions agree perfectly with our alluvion. Both these authorities favor our pretensions. *Arenales* and *arenal grève* as defined by them, substantially agree that they consist of "a shore composed of coarse sand and gravel on the borders of the sea or a river, which affords a facility to land and discharge merchandize." There is a perfect resemblance between them and our alluvion, inasmuch as we land and discharge merchandize upon our alluvions. After examining other learned authors on this subject, Mr. Mazureau concludes that whether we take the authorities of Connelly or Nuñez de Taboado; or rely on the popular signification of the word in question, that an *arenal* is only a *batture*; a *batture* an *alluvion*.

5. The defendants' counsel say the law which speaks of the *arenales* does not give them to cities; it speaks of them only as things that *may belong* to them. The law on which our adversaries found all their hopes, is precisely that upon which repeses a part of the pretensions of the public of the city. It is found in Partida 3, tit. 28, and law 9—already referred to.

In the case of Packwood vs. Walden, the Superior Court declared that the law 9, tit. 28, Partida 3, gave the *battures*, *arenales*, to cities.

In that of Cochran et al. vs. Fort et al., the court recognized this right in favor of the city; and let it not be said, that each of these decisions is an "*obiter dictum*," to which no weight should be attached.

I have no objection to its being said, that the passing remarks which a judge elsewhere makes in giving the motives which determine his decree, are *obiter dicta*; but when I see, that the constitution makes it the duty of the tribunals here, to give the motives and reasons of their decisions and to cite the laws

upon which they are founded, neither the most adroit and subtle reasoners, nor the most powerful authorities can induce me to believe that what may elsewhere be called an *obiter dictum*, is not with us an inseparable part of the judgment and decision of the court.

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The only object of the constitution, in exacting that the tribunals should give the motives for their judgments, and cite the laws upon which they were based, must necessarily have been to banish every thing arbitrary from our jurisprudence, and to place the law eternally above the judges. If there were any other, it could be only that of enabling the people to inform themselves of the wisdom, capacity and integrity of the judiciary power; and this opinion is confirmed by the fact that the state, the people by their representatives, have provided with their own funds for giving a greater decree of publicity by printing, to the decisions of the Supreme Court.

6. I have, I believe, said more than sufficient to overthrow this last position of our adversaries, and shall, therefore, go on to their sixth. And here I find, that I am further advanced than I imagined, and that, in driving the enemy from the fifth, we have, at the same time, carried their sixth intrenchment. In short, they can no longer be permitted to say, that the *arenales*, the battures in front of cities belong to the public, if by that public is meant a being distinct and separate from the public of New Orleans. There seems to me to be no middle point.

The batture belongs to the town or city, or it belongs to each individual owner of a lot, a thousandth part of its foundation (fonds,) situated on its front.

But I have already demonstrated, that the batture can neither be claimed nor owned by any individual. Consequently it must belong the city.

Can the state or nation have any right to it? We nowhere find, either in the Roman, Spanish, or French laws, that the alluvions either within or without the limits of cities, belong to the state, or nation.

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Upon what foundation therefore, could it be pronounced, that the batture, which forms the object of the present suit, belongs to the state or nation, to all the people of the state or nation?

I submit this question to the boldest, and most learned of all our lawyers, whatsoever may be the dignity with which they are invested. And in so doing, I tell them not to forget, that, as the Roman law instructs us, the right of acquiring by alluvion is derived from natural law, from the "JUS GENTIUM," as it is called by Justinian. That if, with us, as among the Romans, the civil law sanctions the right of alluvion, it is from the supremely just and equitable consideration, that the land of the riparian owner, which has no other limit than the river, is exposed to be damaged, impaired, diminished, and carried away by that river; and that the alluvion is given to him as a compensation and indemnity for the risks and charges which the law imposes upon him.

When the city of Orleans was laid out, did it enter into the imagination of the founder, to say to the colonists, to whom he gave lots: You shall protect yourselves against the river, you shall make, and keep in repair the public road and streets. If the river washes away the bank, or destroys the road, you shall furnish others at your own cost. If, on the contrary, it adds alluvion to the shore it shall belong to me? Nothing can be more improbable, and yet he was a monarch, a despot.

And now tell me: if the river gradually undermines and carries away, or suddenly swallows up the shore and levee in front of the city, would the state or nation be affected by it? Would they be bound to furnish a new shore, levee and high road in front of the city at their expense? Should any one be found, endowed with sufficient hardihood to maintain the affirmative, a thousand voices would unite with mine to stamp the groundless assertion with the brand of utter absurdity.

Neither the state, nor the nation would have to support the losses, which the river might occasion to its banks, to the levee, quay or road, any more than they are bound to reimburse the

city the hundreds of thousands of dollars, which during the last thirty years, it has expended in the construction, keeping, and repair of those objects.

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We must, therefore, conclude that the city, which has alone and always supported these expenses, and been exposed to the loss; which ever and alone has been burthened with every charge, should alone profit by the alluvions.

7. I proceed to the seventh, and last position, assumed by the defendants, to wit:

“That the faubourgs Delord and Saulet were not incorporated by the act of 1805, but by an ordinance of the City Council, in 1835; consequently, that the alluvion, formed before that period, cannot belong to the city.”

If I be not greatly deceived, nothing is more easy to overthrow than this their last proposition.

For this purpose, the examination of two facts is involved; and our duty, in investigating them, is to search for and bring to light the truth, and nothing but the truth.

In one sense, it is correct to say, that the plantations Delord and Saulet were not incorporated with the city of New-Oleans by the act of 1805; but this sense is very limited, and far from being absolute.

It were unnecessary for me to say, that it is true that the *faubourgs* Delord and Saulet were not incorporated by the act of 1805. To say that they were, would be to assert, that a being which is not born, has no existence, nor is yet thought of, might be an active or honorary member of a company; a folly, which, I believe, has not yet been here advanced.

But it does not result from thence, that the two plantations, Delord and Saulet, were not in any manner incorporated: they were really incorporated by the act of 1805, though only for the purpose of police.

But they were not incorporated in such a manner as to make them urban properties, they still remained rural; and the law which created the corporation, within whose limits they were embraced, considered them in no other light. In fact, the

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sixth section of that act forbade the city council, which it created, to impose upon the properties situated within its limits, and which were not divided by streets, any tax for lighting, cleaning, watering, and city watch. It would have been very strange, arbitrary, and even tyrannical, to constrain a rural proprietor to become urban. Such a law would have been a violation of the great principles of our constitutions. This I have said and acknowledged, as well in the court below, as here.

Therefore, so long as Madame Delord and Mr. Saulet made no change in their respective rural properties, they continued to be riparian owners of rural estates, although embraced within the limits given to the city. Thus, so long as they were only connected with the city, for the simple purposes of police, they had an incontestable right to profit by every accession made to their respective plantations, their rural estates, by alluvions.

But in 1806, or 1807, these two plantations, situated within the limits of the city, were both divided into squares and streets, converted into faubourgs.

From that time, the prohibition, contained in the 6th section of the act of 1805, was removed.

From that time, by the express will of their proprietors, these two plantations ceased to be rural, and became urban estates, integral parts, for all public, legal purposes, of the city of New-Orleans, and could be taxed.

What are we to conclude from these indisputable facts? That, very long before 1835, the faubourgs Delord and Saulet were duly incorporated with and united to the city of New Orleans; that they were so united and incorporated from 1806 or 1807. I will now examine the assertion, that those faubourgs were only incorporated by an ordinance of the city council in 1805. I ask, by what authority could the city council incorporate faubourgs? For my own part, I know it not; and if such authority has been delegated to it by law, it has escaped all my researches.

But, in 1810, a law was passed by the territorial legislature, (page 49 of the acts of that year) of which I have already spoken, which enacts :

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"SECTION 1. That the keeping and repairs of the levees of every real property situated on the banks of a river, which have been, or shall be for the future, divided into lots, and which shall not have been annexed to a city already incorporated, or which shall not have been erected into a city, borough or village, and as such incorporated, SHALL BE AT THE CHARGE OF THE WHOLE OF THE PROPRIETORS OF THE LOTS situate on the said real property; and, for that effect, the parish jury shall cause to be valued every one of the said lots; and the amount to be paid by every one of the proprietors, for the keeping and repairs of the said levees, shall be in proportion to the valuation of said lots: Provided, that, in the valuation of said lots, by virtue of this act, the same shall be valued without including, in the said estimation, the value of any part of the improvements which might have been made by the owners upon said lots.

"SECTION 2. That the repairs of the roads, streets, and avenues on the said real property, divided into lots, without having been incorporated or annexed to some city, borough, or village, already incorporated, shall be made by the proprietors of the lots in front, whereof the said roads, streets, or avenues, are to run conformable to the plan of the said real property, situated on the banks of a river, and divided into lots, as aforesaid."

In March, 1813, a new law was passed by the legislature of the state, upon the same subject, the first section of which is conceived in the following terms :

"That so much of the sixth section of the act incorporating the city of New-Orleans, passed in one thousand eight hundred and five, as gives the city council power to lay tax, for the use of the city, on the suburbs, which are laid out into streets,, outside of the city and incorporated suburbs, shall be, and is hereby repealed, with all acts having reference

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thereto, until the city council shall extend to the aforesaid suburbs equal support and privileges with the city and incorporated suburbs, agreeable to the tax that may be laid on such suburbs by the city council."

These two laws are the only enactments which I know, having any relation to the subject in question.

But I do not see any thing in those acts which gives the city council the right of incorporating faubourgs.

On the contrary, the first seems to me to repel the idea, and to be in no manner applicable to the property (*fundus*) contained within the incorporated limits.

The second abrogates, without repealing, the sixth section of the charter of 1805; for, if it prohibits the execution of the powers contained in that section, it also authorizes their exercise, when the city council shall judge it convenient to extend to the faubourgs, of which it speaks, the same support and privileges which it accords to the city and incorporated faubourgs, in respect to the tax that may be imposed on them.

This law, well examined, signifies then, simply, that the city council shall employ for the lighting, cleaning and watering of the faubourgs in question, the proceeds of the tax that may be imposed upon them. It signifies, and can signify neither more nor less, if its expressions be compared with those of the 6th section of the act of 1805.

Thus, I nowhere find, but that the plantations Delord and Saulet were incorporated by the act of 1805, at least for certain objects of police, such as subjecting them to the ordinances and regulations which might be made by the city council, concerning the roads and levees, and also the public order and safety.

I see, on the contrary, by the act of 1805, the express faculty given to the proprietors of those plantations, to assimilate themselves entirely to the city and faubourg already existing; always under the condition of paying such a tax as should be imposed upon them, after their division into streets, squares, lots, &c., for their lighting, cleaning, &c.

I see, afterwards, a modification of the dispositions contained in the 6th section; a modification which, in its result, forever subjects the faubourgs Delord and Saulet to a tax; provided, that the proceeds thereof be employed for their exclusive benefit.

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Thus, when, in 1806, the plantations of Delord and Saulet were divided into streets and lots, &c., they profited by the faculty of being assimilated and annexed, by the pure, simple, free and entire consent of their proprietors; and, since that time, the faubourgs, into which these two plantations were converted, have never ceased to be, in fact and in law, incorporated with the city of New Orleans. It is, therefore, to a certain degree an error, to advance that those faubourgs were not incorporated by the act of 1805. Their incorporation goes back to that period. Whether in 1835, or at any other time, the city council may have made any act, passed or adopted any resolution, deliberation or ordinance, which may have been entitled, either by itself or others, an act of incorporation can be a matter of no importance.

We will discuss the supposition, that the act of 1810, which I have cited, is applicable to the faubourgs Delord and Saulet.

Madame Delord and Mr. Saulet were obliged, by their original title, to furnish and keep up the levees and road along the front of their respective lands. This charge was imposed upon them, and from thence resulted their right to the accession by alluvion.

On the erection of their plantations into faubourgs, in 1806, they enclosed by a levee, all the part of the batture sufficiently high to be incorporated and united to the principal property, and thus subjected to their private ownership.

From that period, they both ceased to be burdened with the care of the levees and roads, which was then thrown upon the public of the city.

In 1810, this charge was taken from the public of the city by law, and imposed upon the whole of the proprietors in the faubourgs erected upon the plantations Delord and Saulet,

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Thus, the charge did not return to these *ci-devant* rural proprietors; they were altogether discharged from it.

Can the Cotton Press Company, supposing it to represent the rights of those two persons, take advantage of either of these circumstances, to call itself the owner of the batture which existed outside New Levee street, by means of which those persons had reclaimed and taken possession of all that portion of the batture which was "*of sufficient height to be considered as private property.*"

L. Peirce, on the same side, argued to show that from the time Faubourg Delord became a part of the city, the plaintiffs, as the successors of the Corporation of New Orleans, were the owners of the alluvion formed thereafter. This right is founded in natural law, in Roman law, in Spanish law, in the Louisiana Code, and in the declarations of jurists and others of what the Louisiana law is and has been administered. It is proper to begin by explaining the law of alluvion as received by those nations from whom we derive our legal system and whose texts we have adopted. These will show that the defendants have not a shadow of claim to the alluvion in contest; on the contrary, that the batture formed outside of the levee on which the Cotton Press stands, and that in its front belongs to the Municipality. The following are the sources of these laws:

Vide Roman law—"Prætereà quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur;" 1 Institutes, tit. 2, law 1, sec. 20.

"Prætereà quod per alluvionem agro nostro flumen adjecit, jure gentium nobis acquiritur; Dig., lib. 41, tit. 1, law 7 and 16, sec. 1, p. 261, 269, *Hulot*. Code, lib. 7, tit. 41, law 1; Tissot's translation, vol. 3, p. 243.

The counsel then goes into learned and critical definitions of the Latin words *Ager*, *ager limitatus*, *agro tuo* and *agro nostro*, and contended that *ager* only applied to fields or rural

estates which may belong to a community; clearly showing that not lots in towns, but fields, cultivated farms belonging to communities, or rural estates were alone contemplated by the word *ager*, and consequently the alluvions formed to them are not governed by the same principles as urban property. See also Calvin's Dictionary, *Verbo Civitas*. He also contended that the Roman law was the common source of the Spanish law, and their tribunals *applied and adopted it*, when their own statutes were silent. So the Spanish and Roman laws may be considered as the same on this subject; both giving the right of alluvion to rural estates or *Riparian proprietors* only.

2. He further urged that the law of Louisiana was not in conflict with either the Roman, Spanish or French texts on this subject. They have been construed by our courts and found to accord with those ancient laws, from the decisions in the cases of Gravier vs. Mayor, Aldermen, and inhabitants of New Orleans in May, 1807, and in Morgan vs. Livingston, in 1810, down to the latest periods. See 1 Harrison's Com. p., 451.

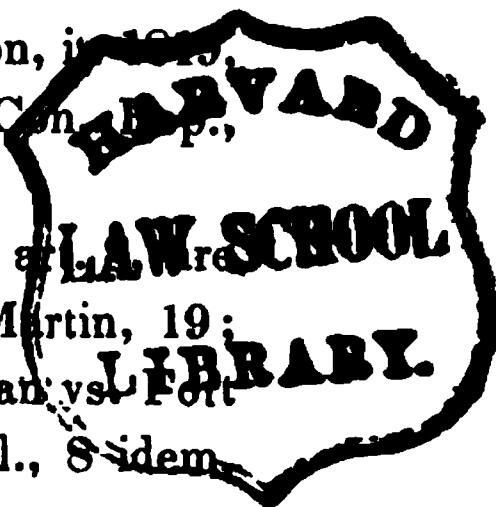
The decisions under the Code of 1808, page 96, are found in the cases of Livingston vs. Morgan, 6 Martin, 19; Packwood vs. Walden, 7 Martin, N. S., 87; Cochran vs. Fort & Story, idem, 627; Cambre et al. vs. Kohn et al., 8 idem, 575.

The Louisiana Code of 1825 has made no change in the law or legislation on this subject. We submit, therefore, with confidence that by the law as always existing in Louisiana, the *alluvion* was only given to rural estates; and that the word "*lands*" was understood as not applying to city lots fronting on a *port*.

3. The defendants have not brought themselves within the textual provisions of our laws. Are they owners of rural estates having natural boundaries, or bounded by the river and as such entitled to alluvion? They derive title from Madame Delord, who in 1806, divided her property into town

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lots, as an addition to the faubourg St. Mary; and sold among others to Larche and Saulet the property that figures on their plans which was also divided into lots. These plans designate the form and boundaries, and show that Madame Delord sold no more than what is described upon her plan, and *is a limited lot*. The plan makes part of the contract of sale, for the lots were sold in reference to it. See the case of Suarez vs. Duralde, 1 La. Rep. 260. In the sale to Larche she does not sell *face au fleuve*, but fronting on the *road and levee*; and expressly charges his lot more, as he is not to be burthened with keeping up and in repair the road and levee. She expressly says: "en outre elle se désiste de toutes pretensions sur le fleuve." The right of alluvion that she had, when a riparian owner of a rural estate, is gone and abandoned.

4. In this case, we prove by Madame Delord's plan that her whole plantation was divided into lots; that the three lots sold to Larche, and those sold to Saulet, forming the source from which the defendants claim the greater part of their front, were of small extent and the whole of it within the incorporated part of the city; and from the time of altering the original condition of the plantation it ceased being such; and every purchaser became owner of an "*area*" or "*insula*" and not of an *ager*. If these divisions had not been within an incorporated city, but continued to be *rural* property they would have come under that class of property to which the right of alluvion was refused. The *ager limitatus* was not confined to those lands taken by the Romans from the enemy, &c.; but applied to all rural property having limits affixed by the hands of man; and whenever there was such boundary the *alluvion was not given*. See *Claude Ferrière, Inst. vol. 2, p. 44.* 1 *Dumoulin, p. 91 and 92.* *Gloss. 5 sec. 120 et 122.*

5. It is contended that the city or municipality has lost any rights it may have had to this batture, by the supineness of the city authorities to a late period, and the acknowledgment of the defendants as proprietors conveyed in the expressions of the ordinances, &c. Property cannot be taken away by

loose expressions and wording of legislative and city enactments; though their solemn and direct enunciations as to future acquisitions would no doubt be effective. The neglect of our rights and interests caused the separation of the city into municipalities. As soon as the second municipality became the administrator of the public affairs within its limits, it asserted the right to the batture in its front, and to administer it for the *use of the public*. Administrators of communities are not created with such powers that by negligence or ignorance, they can alienate the property intrusted to their charge. Consequently nothing could be lost by the former administrations of this property, by admissions, acknowledgments, or by implication from their acts. La. Code, art. 426-7-430. See also the case of *Pierce et al. vs. New-Orleans Building Company*; 9 La. Rep. 403. See act of 1805, sec. 11 *ad finem*.

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6. We conclude that any expressions used in the ordinances cannot be urged against us to deprive us of our property; and that no solemn recognition of any rights of the defendants was ever made by the Council and approved by the Mayor; that had it been so, an acquiescement or abandonment would not have had any binding effect, because not within the scope and power of their administration. Had they done so, their acts could at any time have been attacked before the judicial tribunals.

7. We have shown that the defendants have no title by the Roman, Spanish, or Louisiana laws, as construed by our own courts; and we will now proceed to prove and show to whom the alluvion or batture now in contest does belong; according to the *jus gentium*, and the Roman, Spanish and Louisiana laws.

The learned counsel then proceeds to show by the act of 1805 incorporating the city of New Orleans, and the act of 1810, amendatory thereof, that the making and keeping in repair roads and levees, in front of all real property situated on the banks of a river, which has been or shall in future be divided into lots and annexed to a city already incorporated, shall

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be at the expense and charge of the whole of the proprietors, &c., in proportion to the valuation of said lots, &c., and that in 1812, the limits of the city were reduced, and the *settlements*, including Madame Delord's property, was made a ward and elected an alderman. Therefore the alluvion formed after 1805 was the property of the public; from the time that the limits of the city were established, every thing hereafter created outside of the then existing levee, did not by any law belong to individual proprietors, and consequently all the alluvion that was formed from the bed of the river *became public*.

8. This alluvion is not formed from the gradual wearing of the land on the other side by the negligence of the proprietors, but is acquired by a regular and an immense deposit. If any loss had accrued by the land being decreased instead of increasing, it would have been the loss of the city; for it would have had to purchase land for a street and levee; the *rural servitude* being extinguished. The city, therefore, has the right and is entitled to the alluvion by the *jus gentium*. See *Pufendorf, droit des gens, de l'acquisition des Accessoires, liv. 4, cap. 7, p. 636, 637, 638; Barbeyrac's note on this passage; Grotius de Jure, Pac. et Bell., lib. 2. cap. 3, sec. 19, No. 8, p. 262*. The Code of 1808 declared that things which belong to cities are public; see also La. Code, art. 445. It is also a matter of history that while this country was in possession of the Spanish government, the use and occupation of the *batture* formed before and in front of the city, was strictly public; and every edifice erected on it without special permission *was abated*, and the space covered by high water was considered as the bed and bank of the river; all alluvions were held as soon as formed for the *use of the city and the public*. The Legislature, by the 13th section of the act of 1805, chartering or incorporating the city, expressly transferred all rights of property which the State might have of every kind; not only what it owned, but also of that of which it had only the *use and enjoyment*. The State did not reserve any public rights within

the city limits; only reserving the power of modifying the charter when it suited.

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Preston, Roselius, R. Hunt, Eustis, Soulé & Hoffman, for the defendants, made the following points in argument :

1. The front proprietors, and owners of the Cotton Press, are riparian proprietors of the soil, and as such entitled to all the *alluvion or batture* which attaches to their property. This character and right is secured to them by both the old and new Civil Codes of Louisiana, and cannot be taken away by any provisions or principles of the Spanish or Roman law, or by the fact of this property being brought within the corporate limits of the city of New Orleans by the act of incorporation of 1805.

2. From the year 1763, when the Jesuit's order was abolished, down to 1831, the defendants and those under whom they claim, held undisputed possession of the property now claimed by the Municipality. During that time it was always considered riparian property. In all the titles of conveyance the *alluvion*, or future increase in front, is expressly mentioned and passed to the purchaser. This property too was liable to all the burthens and duties of riparian owners. They kept the highway and levee in repair. They were repeatedly allowed to change the levee in order *to take in* the alluvion. In 1821, Geo. Hunter, one of the persons from whom the defendants derive title, was authorized by the Parish Court to extend his levee; the police jury recognized him as riparian owner. In 1830, Burthe's property was recognized as riparian, and he was allowed to extend his levee in order to take in the batture; and the City Council and city authorities repeatedly recognized the front owners to be riparian proprietors. The city ordinances relating to roads, bridges and levees made the same recognition. The front proprietors were considered as proprietors and makers of the levee, and required under penalties to keep them in good repair. See old edition of the "city laws," pages 39 to 53, 61, 167.

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3. All the authorities and the principles derived from the civil law agree in establishing two main points for the defendants: 1st, that the banks of a river are the property of those who possess the adjoining lands; and 2d, that what is added to an estate by alluvion belongs to the proprietor of that estate.

In the Institutes of Justinian, lib. 2, tit. 1, sec. 4, *de usu et proprietate riparum*, principles in support of the above position are laid down. See also Dig., lib. 1, tit. 8, sec. 5, *verbo Riparum*; idem, lib. 41, tit. 1, sec. 30. The Spanish law is also explicit on this point; Partida 3, tit. 28, law 6, which says, "*every one may make use of ports, rivers, and public roads.*" Civil Code of 1808, page 96, art. 8, "The property of the shores of rivers belongs to those who *possess the adjoining lands*. See Morgan vs. Livingston, 6 Martin, 230; La. Code, art. 446.

4. Whatever is added to an estate by alluvion becomes the property of the owner of that estate; and therefore Madame Delord Sarpy and the defendants claiming under her are entitled to the alluvion formed in front of and united to the said property. The principle on which this rule is based is so natural and just that it will be found to pervade all systems of law. The Roman law lays down the rule in a variety of forms. See Institutes, lib. 2, tit. 1, sec. 20, *verbo de alluvione*; idem, lib. 3, tit. 24, sec. 3; idem, lib. 2, tit. 1, sec. 22; Digest, lib. 41, tit. 1, sec. 7, § 1; Code, lib. 41, tit. 1, sec. 56; idem, lib. 7, tit. 41, 1, 3; Partida 3, tit. 28, law 28, 31; Civil Code of 1808, page 102, art. 3; idem, 104, art. 8; idem, 106, art. 13 and 14; La. Code, art. 490, 496, 501.

5. The plaintiffs rely with great confidence on the Spanish laws, especially Partida 3, tit. 28, law 9. This law speaks of things which belong to a city as founded by the sovereign under the Spanish laws. The lands were granted and appropriated for the site, and other lands granted and appropriated for the use of the city. Therefore the beaches and sand-bars within these lands belonged to the city by the grant or appropriation of the founder, under the authority of his sovereign. These

sand-bars were not necessarily alluvions, but might be formed by the washing of the soil from the sand-banks. *Alluvions*, too, under these regulations and laws, in the front, &c., of the city, became *its* property, because the city was by *grant* or *appropriation* the riparian proprietor of the land to which it was added; just as they would have accrued to an individual who owned the front or land to which they accreted. The *Arenales* were granted or appropriated to a city; they were entitled under the appropriations or grants of the sovereign or founder to all the sand-bars, which is proved by the fact that the liberties of the city, the forests, pastures, &c., are placed on the same footing and could only be held by grant or appropriation. See 2d vol. Land Laws, appendix 1; Nos. 66, 69, 70, 92, pages 36, 37, 44, Recopilacion de leyes de las Indias, book 4, tit. 7, law 13; idem, lib. 4, tit. 13, law 1.

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6. It is not denied that the general rule laid down in the Civil Code, art. 501, is that "*the alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or a creek, and whether the same be navigable or not; who is bound to leave public that portion of the bank which is required by law for the public use.*" This is the principle of the law in Louisiana, but the learned counsel of the plaintiffs say the Roman law must be consulted, and its modifications taken as the true rule on this subject. With the view of proving this, it is contended that the word *ager* referred to, must be properly understood and its different meanings attended to. We find it first in the Digest book, 50, tit. 16, law 27, *de verborum significatione*—"Ager est locus qui sine villa est;" *Ager* is a place without buildings. See Cujas, vol. 8, p. 481. Calvin's Dictionary is likewise quoted verbo *Ager*. For the definitions of the words *fundus* and *predium* see Dig. book 50, tit. 16, law 211, 215. According to all these definitions it is clear that *ager* means a piece of land without any buildings; *fundus* is applied to land on which buildings are erected; and the word *predium* (to use the language of the Judge *a quo*) "in its restricted sense means perhaps only a

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rural property, to wit: a farm, an estate, a manor; in its more extended sense it includes *ager*, or any other real property and the possession of it." These *words* according to the authorities cited, it is contended, show us "that in the text of the Roman law, the alluvion is given only to the *ager*." That *heredad* in Spanish means the same; the translation of the Institutes into Spanish by *Berni*, using this word for the Latin word *ager*. It is admitted the two words are the same in the different languages. But the word *ager* in the Institutes and Digest is simply used to express the idea of *land*, *ground*, or *soil*; and how can this advance the pretensions of the plaintiffs? The context of *Ager* is "*Præterea quod per alluvionem agro flumen adjecit, jure gentium nobis acquiritur.*" This law is merely enunciative of a general principle of the law of nations on the subject of alluvion. The plaintiffs however claim on the distinction between *urban* and *rural* property; that on becoming a city they are entitled to the alluvion. In support of the foregoing principles and rules, see La. Code, art. 501. Napoleon Code, 556. Institutes, tit. 1, law 2; *de alluvione*. Partida 3, tit. 28, law 26. 8 Locré, No. 15, 21. p. 163, 182. 3 Toullier, No. 149 et seq. 4 Duranton, No. 400. Merlin verbo *alluvion*.

7. It is next urged that the reason on which the principle in relation to the right of alluvion is founded, is inapplicable to the riparian owner of riparian property. The maxim of natural justice and equity expressed in the Roman law is *qui sentit onus, sentire debet et commodum*;" he who is exposed to the loss of the thing, ought to profit by the advantages which may accrue to it. But it is boldly assumed that the riparian owner of city property is not exposed to suffer loss from the river, and that he is not therefore entitled to the advantages resulting from it. This position is incomprehensible. Suppose a town lot or square is undermined by the current and is carried away by the abrasion, it cannot be denied that the owner sustains a loss, occasioned by the river, which would not have happened if the property had not been *riparian*. Will

either the corporation or any other person indemnify the owner for the loss? Certainly not. How then can it be said that the owner of city property thus situated is not exposed to sustain damage from the river? So far from being exempted from the *onus*, the loss to which the riparian owner of urban property is exposed, is infinitely greater than that of the rural proprietor.

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8. But the court below lays down the broad rule, and says, "if the right of alluvion is a consequence of that principle of law and equity, that he who is exposed to suffer by the encroachments of a river, should likewise have the benefit of the additions which the river makes to his land; or in other words, that he who has against him the chances of loss, should also have in his favor the chances of gain, a powerful reason at once presents itself, why the owners of front lots in a city should not be entitled to the alluvion, and why the city should be. In a city the owners of front lots, if the bank is carried away by the water, are not bound to give their lots for the establishment of a new bank, unless the community indemnifies them; the city, on the contrary, if the bank is washed away is obliged *to pay for the ground necessary to build a new bank upon.*"

This assumption of principles although sanctioned by the solemn judgment of the court *aquá*, is, so far as our researches carry us, without the aid of any provision of law to justify them. The 501 article of our Code, quoted above, enacts in the most positive manner that the front proprietor "is bound to leave public that portion of the bank which is required by law for the public use." The space thus required to be left for the public use is fixed by the Municipal Councils, or Police Juries. In the case of Henderson and others vs. Mayor, Aldermen and Inhabitants of New-Orleans, so much referred to, it was decided that the present defendants, or what is the same thing, those to whose rights they have succeeded, were bound to give the land necessary for a new levee, without indemnity. The judgment declares that "*no indemnity is due*

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for land used for a levee. This is a charge to which all riparian proprietors are subjected. It is different when new roads or streets are to be established. The law provides in such cases that the owner of the land over which they pass, is to be indemnified." Here it is seen the present defendants were required by the decree of this court to give the land necessary for a *new levee without indemnity*; and now when their right of alluvion is disputed, they are told they do not possess that right, because if a new levee is to be made they are not bound to furnish land for that purpose, without being indemnified by the city. Is this any thing but mere mockery?

Both the court *aquá* and the counsel for the plaintiffs are mistaken. The owners of front lots in a city are bound to give sufficient space for a new levee, if the former bank is carried away by the water. This is a "charge to which all riparian proprietors are subject."—It results from the situation of the property. This is the well known and settled law of the land; and it had never before been seriously disputed. There is not an instance on record in which the city has paid for the ground necessary to build a new levee? Besides the riparian owner has no choice; for if he should be obstinate and attempt to withhold the ground for a new levee, his property would be exposed to ruin.

9. The claim of the plaintiffs to the property in dispute is based upon the supposed legal effect of the incorporation of the city of New Orleans, and of the division and sale of the plantation, of which the property formed a part, into lots. It is stated, that by reason of these acts, the title to the alluvion or batture in front became vested in the corporation of New Orleans, for the sole and exclusive use and benefit of the public, and is now vested in its successors, the present plaintiffs.

The whole of the property in dispute is alluvial: part is applied to the purposes of private ownership, and that portion outside the present levee is subjected to the public use: the

title to this latter portion the plaintiffs assert is also vested in them, for the causes before recited.

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Thus, it will be seen that the plaintiffs take upon themselves affirmatively to show that the law gives them the title to the property.

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Considering the case entirely independent of the exceptions taken to the plaintiffs' right of recovery in the plea and answer of the defendants, it has all the appearance of an experiment—certainly a bold one. It meets at the very commencement the judgment of the Superior Court of the Territory in the case of Gravier, which negatives every proposition of law on which the plaintiffs can expect to recover. It is opposed by the acquiescence in the principles settled in that case by the city and the community for upwards of thirty years. Since that decision, battures in front of our suburbs have been the subject of private ownership; they have been occupied and improved by the proprietors; they have been in all respects considered as any other private property; they have been bought and sold, and interests have been created in relation to them, which would never have existed but from the confidence of the people in the integrity and intelligence of their principles of justice.

To disturb the possessors of property under circumstances like these—to scatter to the winds interests created under the sanctions under which these have grown up—there must be a reason of the strongest kind. The high intelligence of the court would in such a case at least require from the plaintiffs indisputable evidence of the existence of the law which vests the title to the property in them. They must be satisfied beyond a doubt, that the laws of the country impose on them the stern duty of undoing what has been done. Nothing must be left to surmise: nothing can be inferred concerning the laws from mere implication: there must be no doubt in a matter of this kind. If there be any doubt, the principles settled in the case of Gravier must stand—the jurisprudence of the country must remain undisturbed, and the defendants remain in the possession of their property.

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By the law of alluvion—a law founded on justice, reason and sound policy, and which prevails throughout the different countries of christendom with a singular uniformity—land is considered not in relation to the ownership of it, but its position. The alluvion accrues to the soil, whether its owner be the sovereign or a corporation, subject or citizen; and a corporation owning the soil must necessarily acquire by alluvion, in the same manner as any other owner would.

The court will consider our codes as the best exponents of the law. The meaning of the word soil is certainly beyond doubt or cavil. The terms *ager* and *heredad* will remain unchanged in their primitive and generic signification—co-extensive with our terms lands and hereditaments of the common law—and the law of alluvion will be left to its general operation, unless something else is shown against it besides the verbal criticism, by which its application has been attempted to be restricted.

What possible relation has the law *ARENALES* to the law of alluvion? If the city held an arenal or a batture, they would hold it under the class of property in which this law places it; they would hold it as property which could be alienated. But this law has no relation to the means of acquiring property. The city may acquire the arenal by alluvion, if it owns the soil to which the alluvion is attached, in the same manner that an individual would acquire it. But of itself the law *arenal* has no relation to the law of alluvion. No mention is made of it in the text, no reference is had to it in the commentators. The attempt to force this law from its evident meaning and operation is not new. It was made in the case of Gravier, by the eminent counsel who argued the case—and failed; for if the court had considered that the law *arenales* gave the battures in front to the city, in the sense now and then contended for, the city would have succeeded in its suit. In deciding that case in favor of Gravier, the court repelled this application of law *arenales*.

The law *in agris* has no more relation to the law of this case, than that just commented on.

It was not in force in Spain, and this court has determined conclusively in the case of *Morgan vs. Livingston*, as to its non-existence as law in this country.

The view taken of this law in the tribunals of France, coincides in a singular manner with that given by Judge Martin, in delivering the opinion of the court.

The royal court of Toulouse, in the case of *Marguet vs. the Commune of Blagnac*, in determining that the intervention of a road was no impediment to the right of alluvion—the road belonging to the proprietor of the riparian estate, and not to the commune—state, in commenting on this law:

“Enfin la loi invoquée n'avait de rapport ‘qu’aux champs qui, après la conquête d’une province ou d’une ville, étaient distribués aux soldats romains, ou partie aux soldats et partie au public, sous certaines bornes ou limites, qui étaient décrites et désignées avec grand soin dans des tables d’airain; et afin que ce partage ne put point être altéré et qu’il n’y eût jamais de confusion au discernement de ce qui leur avait été assigné, on voulait que ces bornes fussent inviolables, et que, pour cet effet, elles ne pussent être ni restreintes ni étendues par le droit d’alluvion.’ C’est ainsi que Duperier explique cette loi, dans ces questions notables de droit, liv. 2, question 3, ou il observe avec M. le Président de Lestang que pour obvier à l’altération que l’alluvion pourrait occasioner aux dits champs ainsi distribués, on laissait toujours un grand espace de terre entre les champs assignés aux soldats et les bords de la rivière voisine; en sorte que son eau ne put aller jusqu’à ces champs, qui, pour cette cause, étaient appelés *agri limitati*.” (22 Sirey, 2, 34.)

The law *in agris* excluded in Rome the description of lands of which it treats, from the operation of the general law; it has no relation to the provisions of our code concerning alluvion or the principles upon which they are founded.

The defendants have no interest in contesting the soundness

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of the principle of the law in agris: it is only its application to the present case that they deny. It would be idle to contend that, in the case provided for by that law, the principle is not properly applied.

In the distribution of lands among the soldiers of the Roman empire, if each concession was limited, and if the space between the lands parcelled out and a river was reserved to the state, or should be granted to a city, there is nothing to interfere with the right of the proprietor of the bank to the alluvion, be he the sovereign power or a city.

How would the application of the principles of the law of alluvion be different under ours, or any other system of jurisprudence? If a man have an estate on the bank of a river, and he chooses to sell part of it, and reserve the bank, what is there to prevent it? What law does he violate?—what right does he interfere with? The purchaser would in this case acquire an *ager limitatis*, and the proprietor retaining the bank necessarily owns the alluvion which may attach to it. Such would be the rights of the parties, without reference to any provision of the law *in agris*.

There can certainly be nothing in this law, or in its consequences, which can give the plaintiffs any right to the property in question.

Chancellor Kent, in treating on the subject of highways, says: "It may be considered as the general rule, that a grant of land bounded upon a highway or river, carries the fee in the highway or river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent. But it is competent for the owner of a farm, or lot, having one or more of its sides on a public highway, to bound it by express terms on the edge of the highway, so as to rebut the presumption of law and thereby to reserve his latent fee in the highway. It is equally competent for the riparian proprietor to sell his upland to the top or edge of the bank, and to reserve the stream or flats below high water mark, if he does it by clear and distinct boundaries. The

purchaser in such a case takes the bank of the river as it is, or may thereafter be, by alluvion or decrease of the flow of the river. He takes it subject to the common incidents which may diminish or increase the extent of his boundaries." 3 Kent's Commentaries, 434, and cases cited.

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Some confusion of ideas is created by connecting the charge of making a levee with the right of property in the soil. There is no necessary connection between the two. The levee, which protects the riparian estate, also saves the adjacent country from inundation. By law, it is at the charge of the riparian proprietor; and by the act of 1821, by which the port of New Orleans was extended, the construction and even repairs of any other levees than those at that period kept up by the corporation, were left at the option of that body.

The riparian proprietor had no right to receive wharfage for the use of his bank; but on making or taking on itself the repair of a levee, the corporation could indemnify itself by exacting wharfage. 1 Moreau's Digest, 653.

By constructing or repairing a levee, or making a road or other way, by the corporation or any public body, no rights of property in the soil are lost or acquired, as these acts depend on the right of use vested in the public, of which the municipal government is the guardian and representative. Our law on the subject of alluvion is general, and assigns no difference in its application to the soil on which a levee is required, and that on which it is not.

The alluvion accruing under our laws *to the soil*, without reference to the ownership, whether it be vested in the State, a corporation or an individual, a question might arise out of the late accident to the town of Plaquemine, which would test practically the application of the principles of the law of alluvion.

Portions of the front lots have been carried away by an avulsion of the river, so that parts of these lots now form a portion of the bank of the river.

The levee which is to be constructed anew on these lots will form the bank of the river. La. Code, art. 448.

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The use of this bank is public, the property remaining unchanged in the owner. Art 446.

The levee being constructed under the direction of the municipal authority, the public convenience as to the use of the bank can be protected.

If an alluvion be formed in front of these lots, to whom would it belong? If the law of alluvion in the code governs, it must belong to the owner of the soil to which it is attached. *As yet*, no law has been found giving alluvion formed in front to cities; and on the principle of equity, on which it is said the law of alluvion is founded, the owner of the land, one half of which has been lost to him by the force of the river, is certainly entitled to the increment which the river may afterwards insensibly and gradually add to his property.

But it might thus happen, that the owner would have more land than his title originally gave him; his land may have been strictly speaking a limited field and not a riparian estate. This increase of quantity might be a consequence of the application of the law of alluvion, and would not be inconsistent with the equity of the rule, that he who is exposed to the loss is entitled to the advantage which may accrue to an estate.

10. The incorporation of the city and the division of the principal estate to which this alluvion belonged, into lots, are alleged to have given the plaintiffs a right to the property in dispute. In order to test the fallacy of this proposition, it is necessary to examine each branch of it separately.

How the separation of a number of inhabitants and a district inhabited by them from the general civil division of the territory of the State, and authorizing them to exercise certain special powers through their representatives can be construed into a cession of any other substantial powers, or as conferring any powers not expressly delegated, is under our system of government not easily understood.

But the division and sale of the estate into lots—how does this affect the right of alluvion? or what is produced by all the

causes combined—the incorporation of the city, division and sale of a riparian estate in lots? It must be borne in mind, that since the first discussion of this question as to the right of the city to the batture in front of the suburbs, there have been two revisions of our laws, and that before the adoption of the old civil code, the claim of the city to the batture of the suburb St. Mary had been rejected in a decision of the Superior Court of the Territory, after an elaborate argument of the ablest counsel at the bar. The subject was a most exciting one at the time; and from the passions it enlisted and the talent which the controversy brought forth, it may be assumed that it occupied a large space of public attention, and was a matter of interest to those who were entrusted with the legislative power. We find in both these codes—that of 1808 and 1825—the subject of alluvion re-enacted, or rather re-asserted, and provision made in the codes for the use and property in the banks of rivers—a classification and mention made of things belonging to *cities and other places*, distinguishing the species of property they may have in each; indeed a thorough and complete legislation on the law of ownership and accession: but we do not find one word directly or indirectly recognizing the right of *cities and other places* to battures, or any thing from which it can be inferred; nor do we find that they have any authority in relation to the acquisition of property; nor is there any distinction between the property of cities and *that of other places* recognized in the codes—they are on precisely the same footing. Civil Code, book 1, tit. 2, art. 440, and seq.; Code of 1808, book 2, tit. 1, art. 7, and seq.

If those rights now claimed for the city are recognized by our laws, is it not singular that no trace of them should exist after these two memorable occasions? If they were deducible from any general principle, there might be a very good reason for their not being mentioned in our codes; but at the time these codes were made, the decisions of our courts were virtually adverse to them. Those decisions were acquiesced in—battures became private property, and the silence of the codes

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in relation to these rights now claimed by the city, when treating on the subject with which, had the rights claimed existed, they would have been identified, will have great weight with this court in their deliberations on these important principles.

There is nothing in the charter of the city, there is no text of the law, which recognizes the principles on which the plaintiffs base their pretensions. They must then be derived from implication? And from what can they be implied? Is it from the silence of our legislation on these two occasions mentioned? Is their existence to be inferred from their now recognition? Is it from the municipal legislation and the conduct of either or of both of the parties in relation to this property? Have such powers been ever held or exercised in any other city? Do our flourishing maritime cities or towns of the north, with their intelligent inhabitants, pretend to possess them? It is believed that neither of these sources will aid the plaintiffs in their attempt to create these powers.

There is something which is very extraordinary in the idea, that the circumstance of a part of a river being made a port, affects the right of property of a riparian proprietor. Do not the banks of our navigable rivers form in fact one continuous port, used by the steamers which land at all points which the wants of our population require? And is it understood that by extending the port of a city, that any thing more is done or attempted than to extend the space in which goods shipped and destined technically *to the port* may be landed, and where voyages are originated and terminate? Indeed, in extending the port of New-Orleans, in 1821, the legislature expressly disclaim any obligation on the part of the city *to make and repair any levees and wharves* other than those at that time kept up by them. 2 Moreau's Digest, 259, verbo *Port*.

The representation of a batture on the plan of a riparian estate divided into lots, without any words indicating a transfer, dedication, or change to be made in relation to it, is the representation of a thing that exists, and which is to continue

in a state which is to be regulated by law ; the rights of the owner are not changed in relation to it, by the representation that is made. The batture is to be kept as the law leaves it, subject to the public use as long as it is required ; and when it is no longer required for that purpose, the owner, never having parted with his property, takes it unincumbered with the use. It must not be lost sight of, that under the law of this state, *the owner of the batture* is obliged to contribute to keep up the levees. Out of cities and incorporated towns, the owners of whole estates, though sub-divided into lots, must contribute to that expense. In those places the matter is left to the municipal government ; and we find this charge sometimes thrown on the proprietors of the front lots, and sometimes assumed by the municipal government.

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It could hardly be sustained as a plausible proposition, that on a sub-division of a riparian estate, a city would necessarily have forced upon itself, *nolens volens*, what might be the onerous charge of keeping up an expensive levee from their general funds. So important a rule as this, certainly, if it existed, would have some other foundation than mere surmise: nor would the usage of upwards of thirty years have failed to recognize it. If the estate or lot be riparian, how can it be supposed that the city, by making a levee on it, or repairing one, or keeping up one, or intending to do either, can affect the rights of the proprietor, or that they can be affected by giving him the privilege of voting for an alderman, and being taxed ?

The grounds just examined are those stated in the plaintiffs' petition, as the foundation of their title to the property in question ; and in order to avoid the consequences of their refutation, which was inevitable, a bolder and less tenable position is taken, viz : that the ground on which the city is founded belongs to the city or to the aggregation of individuals composing it.

This proposition, unsupported by reason or authority, we are content to leave to its own refutation. It carries with

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itself the elements of its own destruction, and any opposition to it would retard its inevitable fate before any tribunal in which justice is administered. At what period did the city acquire the property of that portion of the Delord estate which was not sold to individuals? It surely was not when the city was incorporated? That at the time of division of the estate, the city might have exacted for the public use the part then existing as batture, may be admitted for the sake of argument, for it might have the right to impose that condition on the proprietor before consenting to the sub-division; but to believe that the batture and the levee charges were forced upon it against its will, and against the evidence of continuous use, is too severe a tax upon human credulity.

The fate of the case necessarily depends on this position assumed by the plaintiffs; and unless it can be maintained, there is nothing before the court on which the defendants can be disturbed in the enjoyment of their property. Nor is it surprising that the position so vitally important should be assumed: it could be taken in no other way. It can be deduced from no known principles of law; it is supported by no analogy; usage and experience are against it; the acts of the plaintiffs themselves repudiate it.

It must be supposed, that by this time the law of property relating to *cities*, if there be any legal principles peculiar to them, as distinguishable from any other civil divisions of the state, must be understood, that at least so important a principle must have been mooted in the different cases which have presented themselves to courts in which the rights of cities have been discussed.

In the cases which have been cited, in which the rights of the cities of Cincinnati and Pittsburg to the property between front streets and the river were involved, no such pretension on the part of either of the cities was urged nor intimated by counsel or judge, and we find that the Congress of the United States, as early as 1806, transferred the right of the United States to the space between the front street and the river, in

the city of *Natchez*, to the corporation of that city, on the condition that it should be planted with trees and be preserved exclusively for the public use. 1 Land Laws, 540.

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Acts of Congress at different times have been passed, granting portions of the property in front of the city of New Orleans to the corporation. Vide acts of April 3d, 1812; of the 20th of April, 1818; of the 30th of March, 1822; of the 28th of February, 1823.

It may be admitted, that these acts in themselves are not conclusive evidence of the fact that the property granted was not legally in the grantee, but they will have due weight with the court in an inquiry of this kind.

And what have been the decisions on the title of the corporation to the property in front of the city? It was claimed as the property of the city, in the case of *New-Orleans vs. the United States*. 10th Peters, 665. Let the arguments of the counsel and the opinion of the court be examined, and nothing implying a recognition of this right on the part of the city can be found in the elaborate opinion delivered by Mr. Justice McLean. Nothing was decided in that case except that neither the fee in the land nor the right to regulate the use was vested in the government of the United States. The land was held to be subject to the public use, in consequence of the dedication, which was conclusively established by evidence; but the title of the city to the property never was recognized by the court.

In the case of *Cucullu vs. De Armas*, Judge Porter says, "on the first point which presents the question of title in the city, I believe the court is unanimous. Our consultations, if I understand them right, brought us to the conclusion that it had no solid basis to rest upon." &c. 5 La. Rep. 186.

Judge Martin, in that case, says: "The appellees (meaning the appellants) have shown no legal title, or right of property in the premises. I have not considered the first plea."

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Judge Bullard, in the case of the two municipalities, 12 La. Rep. 65, says :

“The pretensions of the defendants, as set up in their answer to the *exclusive ownership of the property* in question, (the batture,) and those of the plaintiffs as evinced in their ordinance of the 9th of February, 1837, to take one hundred thousand cubic yards of sand from the batture, *ad libitum*, (if indeed either party has seriously urged such pretensions,) are, in our opinion, equally unfounded and preposterous.”

Neither from the act of incorporation, nor the division into lots, nor the extension of the port, nor the establishment of the city, can any vested rights of property be affected by implication. The changes, which are produced as to the rights of property, are matters of contract between the owner, the purchaser, and the sovereign authority or its delegate. Nothing can be implied except such easements of way and other rights which are necessary to the enjoyment of the property as it is sold. And the idea of the title of property of this description being vested in the city, place, parish, or any other civil division of the State, unless it be acquired in the same manner as a natural person would acquire it, is not only unsupported by reason or authority, but is repudiated by both.

11. The last question raised in argument by the counsel for the plaintiffs, is, that Madame Delord dedicated the property in dispute to the use of the public. This evidently is an after-thought, as there is no averment whatever in the petition on the subject. According to the rules of correct practice, the point does not arise at all in the case. If the court should be of opinion, however, that the question can be examined in the present suit, we would ask the adverse counsel, what evidence there is of a dedication? They say it results from the plan of the faubourg. It has been already shown, in a previous part of this argument, that Madame Delord sold the front lots, *face au fleuve*; or, in other words, the river was their natural boundary. This fact, is certainly not evincive of an intention, on the part of Ma-

dame Delord to dedicate the space between the road and the river to the use of the public ; it is, on the contrary entirely inconsistent with such an intention. Nor can the dedication be deduced from the plan. This case cannot be assimilated, in this respect, to that of *De Armas et al. vs. the Mayor, Aldermen and inhabitants of New Orleans*: in that case the space of ground in controversy had been specially dedicated to the use of the public on the original plan of the city, by writing on it the word *quai*. The objection urged by the senior counsel of the plaintiffs to the dedication, (and successfully urged too,) was, " That the space of ground under consideration, and which the counsel for the corporation, and the plan of the city, calls a *quai*, is not a *quai*, but is formed by nature, while *quais* are the works of man. That on rivers and in cities, they are levees ; in the sea ports the shores of the sea are called *quais*." *Dictionnaire de Feraud* and *De Verger, verbo quai*. *Traité de la Police de Paris*, 97, 98, 99, 102. *Loi de St. Domingue*, 2 vol. 725 ; 3 *ibid*, 447, 763 ; 4 *ibid*, 771, 791 ; 5 *ibid*, 473, 651 ; 6 *ibid*, 57, 290, 526, 528, 568 ; 5 *La. Rep.*, p. 144-5.

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In the present case one of the same authorities is cited to prove that a *quai* is not always an artificial construction of man, but is often formed by nature. One of the definitions quoted by him is—

" *Quai*, en terme de marine, est un espace sur le rivage du port, pour la charge et la décharge des marchandises."

Judge Martin was of opinion that the plan afforded sufficient evidence of dedication: and in this he was clearly right, although he was overruled by the majority of the court. In support of this opinion, the learned Judge takes the same distinction which we have endeavored to point out, between common property, to the use of which only the public is entitled, and common property the title to which is vested in the corporation. 5 *La. Rep.*, 132, 144-5.

The principles here inculcated are fully recognized by the Supreme Court of the United States in several decisions. In

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the case of the city of Cincinnati vs. the Lessee of White, 6th Peters' Reports, p. 437.

The same doctrine is substantially laid down by the same court in the case of Barclay and others vs. Howell's Lessee, 6th Peters' Rep. p. 498.

In the case of Crossman et al. vs. Vignaud et al., decided by this court in October term, 1839, the question was whether an alley, nineteen feet wide, which had been open and used by the public as a passage, for thirty or forty years, should be considered as having been dedicated to the public. In delivering the opinion of the court, Judge Strawbridge remarks: 14 La. Rep., 175.

"In support of the first ground, the counsel have referred us to the cases of the city of Cincinnati vs. White's Lessee, 6 Peters' Rep. 435; Mayor, &c., of New Orleans vs. The United States, 10 ibid, 712, and the opinion of Judge Martin, in the case of De Armas vs. the city of New Orleans, 5 La. Rep., 132.

"Had the plan of the town of Natchitoches (a portion of which is in evidence,) exhibited this space as an open lane, or had the premordial titles so treated it, these cases would have applied; but it is admitted that the defendants have shown a good title to fourteen feet. The town surveyor deposes that no such space has been marked on the plan; that, though all the streets have been named, this has been nameless; and it is shown by the act, or deed, under which the plaintiff holds, that the boundary given is the defendant's line, thus including the remaining five feet of the alley in his lot. These circumstances, so far from showing any destination to public use, leave on our minds the conviction that the property was private, and that the case does not fall within the rule invoked."

But it is insisted that the dedication results from the necessity of the case—that unless the property belongs to the public, all ingress and egress will be shut up. If this be true, then we must suppose that Philadelphia, Baltimore, Boston, and the other large commercial cities in the Union, are entirely unap-

proachable. The alluvion and even the wharves, in all those cities, belong to private individuals, who charge wharfage for the use of their wharves. The objection, however, is only imaginary, and is entirely unsupported by the facts of the case. The streets in the faubourg Delord are run out to the river, consequently all the alluvion which forms in front of their abutments, adds to their prolongation; there is, therefore, no reasonable ground to fear that the streets will be shut up. As to the free passage along the shores of the river, it is fully secured by the obligation imposed on the riparian proprietor, "to leave public that portion of the bank, which is required by law for the public use." La. Code, art. 501.

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So far from there being any evidence of dedication, there is the strongest negative proof that the parties never dreamed of such a thing. It is a fact that in 1806 Madame Delord sold the front lots *face au fleuve*, and ceded all her right of batture to the purchasers in express terms. Since that period the right of the riparian owners was never contested until 1830, when the suit of Henderson and others against the Mayor et al. was instituted. During the twenty-four years that intervened between 1806 and 1830, the rights of the front owners were repeatedly recognized; the levee was advanced nearer the river, and the riparian owners were put in possession of the batture reclaimed. The soil thus added to the city was treated in every respect as private property. The front proprietors were compelled to make the levee and keep it in repair. This was an illegal exaction, but still they complied with it. Mr. Pilié, in his cross examination, at page 17, of the printed record, says:

"Previous to 1831, the levee and road in front of Faubourg Saulet, were made and kept in order by the front proprietors. He does not know that any orders were given to the front proprietors to make and repair the levees and road in front of their properties. He does not know of any refusal of the Cotton Press to make the road and repair the same; on the contrary, the Cotton Press always insisted on making the road and levee

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themselves in front of the Cotton Press—that is, since 1831—previous to that time they have always made it themselves *and also repaired it.*”

When we examine the city ordinances, we find abundance of proof that the defendants were always treated as riparian owners. We will cite a few of these ordinances :

The first is the fourteenth article of an ordinance approved 28th July, 1815, p. 45 of the City Laws :

“ Art. 14. The works necessary for making and keeping in repair the said roads, bridges, ditches and levees, shall continue to be done at the expense of the respective landholders ; the said works shall be commenced every year in the course of the month of July, or at the latest, in the course of the month of August, and they shall be completed by the first of October following, at farthest.”

The second, is the seventh article of an ordinance, approved on the 15th December, 1817. City Laws, p. 163.

“ Art. 7. The levees adjoining the estates bordering on the river, situate in front of unincorporated boroughs or suburbs, which have hitherto been kept in repair at the charge of the proprietors whose lands are bounded by the river, whether by virtue of a particular clause stipulated between the vender and the purchaser, or of an obligation anterior to the settlement of said boroughs or suburbs, shall continue to be kept in repair at the expense of said proprietors, in the manner prescribed by the ordinance concerning highways, bridges and levees within the liberties of New Orleans.”

And the first four articles of an ordinance, approved the 5th of October, 1830. City Laws, p. 61.

“ Art. 1. Be it and it is hereby ordained by the City Council (being vested with the powers of police jury) that the City Surveyor shall lay off and mark with stakes, the lines for a new levee, according to a plan submitted by said Surveyor to the City Council, commencing at the lower line of Faubourg Delord and running parallel with the New Levee street to Rof-

signac street, thence to the upper line of Mr. Byrne's property and in front of said Byrne's steam saw mill.

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" Art. 2. After the Surveyor shall have finished making and staking off the above work, the proprietors shall be notified accordingly, and they shall be bound to complete and deliver said levee on the first day of November, eighteen hundred and thirty-one, as surveyed by the City Surveyor, under the penalty prescribed in the third section of this ordinance.

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" Art. 3. The Mayor shall notify the front proprietors of lots in Faubourgs Delord and Saulet, in one or more of the gazettes of the city, in French and English, stating that they, the front proprietors, are required to have the said levee completed and delivered at the period fixed by article second of the present ordinance; and in case of contravention, the same work shall be done by the city at the expense of the front proprietors, as soon thereafter as the said work can be done in a proper manner; and any person neglecting or refusing to comply with the provisions of the present ordinance, shall pay a fine of one hundred dollars.

" Art. 4. The said work shall be constructed under the direction of the City Surveyor, whether made by the proprietors, or by the city at their expense. The Surveyor shall lay off at the same time, a new road, running inside said levee, sixty feet wide from the outside and including said levee. Said proprietors shall be obliged to make and keep in repair said levee at their own expense."

Is it possible, with all this evidence before our eyes, that the gentlemen can still talk about a dedication? This proof is sufficient to show that, even if there had been an intention to dedicate, it was repudiated by the corporation.

The use of the banks of the river, and of the unreclaimed batture, was vested in the public by law,—hence no dedication was necessary as to those things. But suppose there had been a dedication, what would be the legal consequence? As regards the soil that has been reclaimed, and converted into private property, with the consent and approbation of the muni-

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cipal authorities, it would not produce the least difference. We have seen, in reading the decision of the Supreme Court of the United States in the case of the city of Cincinnati vs. the Lessee of White, that when a person dedicates property to the use of the public, the fee or title remains in him, unless there is a regular transfer of it to a grantee. It follows, as an inevitable consequence, that where there is no transfer of the title, and the legal representatives of the public ordain that the property dedicated shall no longer be applied to the use to which it was dedicated, the property reverts back to the owner, in whom the title has always remained. This appears too clear to admit of a doubt. If there was a regular donation or other transfer of title to the corporation for a special object, and the corporation violated the condition of the contract, by applying the thing given or transferred to another purpose than that stipulated, the donor or transferrer would have to bring his action to dissolve or annul the contract, in order to obtain the retrocession of his title. When there is a mere dedication of the use to the public in general, without any transfer of title, no action is necessary. Apply these principles to the case before the court. The public authorities have declared that all the soil reclaimed from the river, and lying between certain boundaries, 'shall no longer be used by the public: they have given express permission to the defendants to take exclusive possession of it, and to apply it to private purposes. So, even if there was a dedication, all the property now susceptible of private ownership, would no longer be affected by it. This hypothetical reasoning, however, is useless in the present case, as there is not a tittle of proof of a dedication.

See also the case of Vick and Rapplye vs. the Mayor and Aldermen of Vicksburg, decided by the High Court of Errors and Appeals of the State of Mississippi, reported in Howard's Rep., vol. 1, p. 379, et seq.

12. Let us now take a brief review of the various decisions of the Supreme Court on this much vexed question, and ascertain what is the well settled doctrine of the jurisprudence of

this honorable court on the subject of alluvion. Some of the cases have already been cited in the course of the preceding observations; but we wish to present a succinct and connected view of the whole current of decisions, from the beginning of the memorable batture warfare up to the present time, for the purpose of showing that the right of the riparian proprietors to the alluvion has always been maintained.

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The first case is that of Jean Gravier vs. the Mayor, Aldermen and Inhabitants of New-Orleans, reported in 1st Condensed Reports, p. 453 et seq. That suit was commenced in 1804, and decided on the 23d May, 1807. The claim of the corporation to the batture formed in front of the faubourg St. Mary, was sought to be supported on the ground that the "tract of land on which the faubourg St. Mary is situated, was bounded by the highway." It never entered the minds of the eminent counsel who were charged with the defence of the city, to place its pretensions on the grounds taken in the present case. The court decided, however, that the river was the boundary of the land, and that consequently the right of alluvion existed. The very point, then, which arises in the case at bar, was most clearly determined in favor of the riparian owners against the corporation. But it is contended that the decision was mainly based on the fact "that, antecedent to the time when Bertrand Gravier ceased to be the proprietor of the land adjacent to the high road, a batture or alluvion had been formed, adjoining the levee, in front of the faubourg upon the river; and that this alluvion was then of sufficient height to be considered as private property, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier." It is said that this was the ground on which the property was adjudged to belong to Gravier. In this we fully concur with the adverse counsel;—that, indeed, was the sole foundation for Gravier's claim. If Gravier had sold all the front land susceptible of private ownership, it is difficult to imagine on what ground his pretensions to the batture could rest. But he alleged and proved that when he sold the lots,

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front to the highway, there was a strip of alluvial land susceptible of private ownership, between the levee and the water's edge. The court decided, that by not selling this portion of soil, he continued to be the riparian owner, and as such, entitled to the increase by means of alluvion.—

The principle laid down in that case has never been departed from, and has become the settled law of the land. What would have been the legal consequence if no batture susceptible of private ownership had existed when Gravier sold his front lots? The right of alluvion would have passed, as an accessory to the purchasers of those lots. That question arose in the next batture case, that of *Morgan vs. Livingston, 6th M. R., p. 216 et seq.* Morgan was the owner of a front lot "consisting of seventy feet of front and a hundred and eighty in depth, in conformity with the plan, &c." acquired through several mesne conveyances from Bertrand Gravier. Livingston had purchased of the heirs of B. Gravier all their right, title and interest to and in the batture in front of the faubourg St. Mary. The question to be decided was, to which of these parties did the alluvion belong? The former insisted that his lot was bounded by the river, and that therefore the accretion belonged to him: the latter, on the other hand, contended that the public road was Morgan's boundary; and that, at the time of the sale by Bertrand Gravier to the person under whom Morgan claimed, there existed a batture of sufficient height to be susceptible of private ownership, and which remained Gravier's private property. These were the grounds on which the respective parties placed their pretensions. The court decided in favor of Morgan, principally, because the evidence established that when Gravier sold the front lot there was no batture outside of the levee sufficiently elevated to be reclaimed and converted to private property. It is perceived that the rule established, in the case of Gravier vs. the Mayor and others, is here adopted and confirmed. The various other objections started by the surprising ingenuity of Mr. Livingston, were all overruled. Some of these objections were

much stronger than those raised by the counsel for the plaintiffs in the case at bar. All the doctrines laid down in that case militate strongly in our favor.

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In the case of *Livingston vs. Heermann*, 9th Martin's Reports, p. 656, the same doctrine was again confirmed. Judge Porter says :

"I have examined the case with the utmost attention, and with an anxiety that has more than once been felt painful, to do that which is right between the parties and satisfy the law. And on the whole, I am of opinion, that at the time of the sale from Gravier and wife, to Vessier, there existed a portion of soil susceptible of private ownership, between the levee and the river; that this soil was retained by the vendor, and that the expressions in the deed, *fronte à la levée*, did not carry the purchaser beyond it."

Judge Mathews, after expressing himself to the same effect, concludes by remarking :

"I doubted much on the propriety of the decision, in the case of *Morgan vs. Livingston*, and finally assented, under a conviction that full proof had been adduced showing that no alluvion existed in front of the trapezium, at the time of its sale to Poeyferré, the vendor of B. Gravier."

We come next to the case of *Packwood vs. Walden*, 7 N. S. p. 81 et seq. The plaintiff asserted that he, in common with the rest of the community, had a right of way, &c., over a lot of ground in the possession of the defendant, and on which the latter had erected buildings : he concluded by praying that the defendant's improvements might be declared a nuisance, and ordered to be abated. The property in question was a portion of batture in front of the suburb St. Mary. Two questions arose in the case : "first, by the formation of the batture, did the place which it occupied cease to be a part of the port of New-Orleans?—Secondly, if so, after the change did it still continue to be public property, unalienable and unalterable in its destination, by any power except that

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of the State, or of the United States?" In discussing the first of these propositions, Judge Mathews observes:

"We will now investigate the matters on which depends a correct solution of the questions proposed. And here it may be said, without impropriety, that the statement itself of the first proposition, seems to involve an absurdity. Land, according to any definition, can never be considered as making a part of a port. A bank, quay, or wharf, is a necessary appendage to it; and, according to the jurisprudence of this State, is always public and destined to the use of all, as well as the port itself. But this public use cannot legally be extended farther than the bank or wharf, which is always distinct from alluvion fully formed, and subjected by law to the ownership of private individuals or public bodies.

"By the Roman law, a port is defined to be *locus conclusus, quo importantur merces, et unde exportantur*. D. 50, 16, 59.

"The definition in the 8th law, tit. 33, part. 7, is nearly similar to the Roman Digest.

"That found in the *Curia Philippica*, page 456, No. 35, states a port to be a place either on the sea-coast or on a river, where ships stop for the purpose of loading and unloading, from whence they depart, and where they finish their voyages.

"It is clear, from these definitions, that the place now occupied by the alluvion in front of the faubourg St. Mary, although formerly a part of the port of New-Orleans, has long since ceased to be such. It is nearer to the port than other squares of the city situated farther from the river, but makes no more a part of it than they do. Reliance was had on the plan of the faubourg made by B. Gravier, to prove that the batture in front was destined for public use; in other words that it was designated as a public place. That such was not the intention of the founder, is evident from his having sold his right to a part of the alluvion to one or two of the purchasers of lots from him. The manner in which this place is marked out on the plan, indicates that it was done rather to

show the peculiar localities which were about to be changed into a town, than for any other purpose."

The whole of this reasoning is in perfect harmony with the principles for which we contend on the present occasion.

When the Judge comes to the examination of the second question, he finds it necessary to inquire whether a city can acquire *jure alluvionis*. He decides the question in the affirmative; and it could not be decided otherwise. Alluvion is one of the legal modes of acquiring property: it was therefore incumbent on those who held the negative of the proposition, to show a law which incapacitated the city corporation from availing itself of this means of acquisition; and as that could not be done, there was an end to the question. Whether there was any necessity, for the purpose of arriving at a correct conclusion, to invoke the law *in agris*, or the law *arenales*, and whether those laws have any bearing on the subject, may well be doubted. There is no difference, as regards the acquisition of property, between the corporation and a natural person, with a single exception, that is, legal inheritance. Hence, when the city owns property bounded by the river, it is, of course, entitled to the benefit of alluvion. And, in the same manner, when the proper representatives of the city make a compromise in relation to alluvion (as had been done with respect to Walden's property,) we are at a loss to conceive what objection can be urged against it.

In the case of *Cochran et al. vs. Fort et al.* 7 N. S. p. 622 et seq. The same question was again raised which had been decided in *Gravier vs. the Mayor et al.*; *Livingston vs. Heermann*, and *Morgan vs. Livingston*. The plaintiffs alleged that they were the proprietors of a lot of ground in the faubourg St. Mary, acquired through Joseph D. Hevia, of Bertrand Gravier: they aver specially "that it was the intention of Gravier to sell, and of Hevia to acquire, along with the said land, the right of alluvion, as the same belonged to the vendor; and that by the deed of sale the vendee did acquire this

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right." They then state, that *since* the sale, alluvion has formed in front of their lot, &c.—In delivering the opinion of the court, Judge Porter says :

"Whether such a right does follow as a consequence of the sale thus made to them, depends on a question of fact, namely, whether any alluvion of sufficient height and magnitude was formed at the time these conveyances were made to them, to be susceptible of private ownership. If it was so formed, it remained the property of the vendor, and did not pass to the vendee.

"This principle was established in the case of *Livingston vs. Heermann*, and it entered materially into the motives of the decision in the case of *Morgan vs. Livingston*. Its correctness has not been impugned in argument, and a review of the reasons on which it was founded, has satisfied us still more of its correctness. 6 Martin's Reports. p. 19—9 *ibid.* p. 656.

After a full and minute examination of the testimony, the Judge observes :

"There is some contradiction in this evidence. We think the weight of it decidedly in favor of the assertion of the defendants : that at the time the petitioners bought from Hevia, there did exist alluvion opposite the lot of sufficient height and magnitude to be susceptible of ownership."

This was the only question which the case presented and to which the attention of the counsel had alone been directed : after solving it, the decretal part of the judgment ought to have followed. But the Judge, in the heat and fervor of composition, dashes on, and makes those remarks on which so much stress is laid by the counsel for the plaintiffs in the present suit. He says :

"Supposing, however this view of the subject incorrect, and that we are to conclude with the plaintiffs, that no batture susceptible of ownership existed in February, 1803, their case could not be made much stronger. The faubourg was incorporated two years after. To enable them, therefore, to recover in this action, they must show a batture created be-

tween the day of their purchase, and the date of the act of incorporation, which was susceptible of ownership; for if the alluvion was formed afterwards, it became the property of the city, and not of the front proprietors."

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This is a mere *obiter dictum*, and is entitled to little or no weight as an authority. The Judge refers, in support of his observations to the famous law *arenales*, and to the case of Packwood vs. Walden. It is very certain that these authorities do not bear him out. But all doubt and difficulty on this subject is dissipated by the opinion expressed in the most emphatic terms, by the same learned Judge, in the case of Henderson et al. vs. the Mayor, Aldermen and Inhabitants of New-Orleans, when the question whether the alluvion created since the act of incorporation belonged to the city or to the riparian proprietors, was raised in the most formal manner. On that occasion he says:

"The laws of the country give to the front proprietor, all the batture formed in front of the soil owned by him on the banks of the river. When this batture has risen to a height to be susceptible of private ownership, it becomes as much his property as the land it is attached to."

This decision was rendered in 1833, and in reference to the very batture in controversy in the present suit. The alluvion was formed many years after the act of incorporation. No candid man will, for a moment, contend, that the loose and uncalled for remarks of Judge Porter, in the case of Cochran et al. vs. Fort et al. can be seriously put in opposition to his solemn adjudication of the question in the case of Henderson et al. vs. the Mayor et al.

The decision in the case of Cambre et al. vs. Kohn et al. 8 N. S. p. 575 et seq. was placed on the ground "that the expressions in the act of sale did not convey to the vendee any right to the alluvion then formed and attached to the lot which he bought." In that case the well established rule on the subject of batture was applied.

The next case in a chronological order, is that of Henderson

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The case of *Cire et al. vs. Rightor*, 11 La Rep., p. 140, is the last on this subject, and was decided in May term, 1837.

The question was, which of the parties was entitled to the alluvion formed in front of a lot of ground in the town of Donaldsonville.—The rule laid down and acted on in all the previous cases, was again recognized, and made the basis of the decision. Judge Bullard remarks :

“On the merits, this case is strongly analogous to that of *Cochran et al. vs. Fort et al.*, and turns upon a question of fact, to wit: whether in 1812, a batture had been formed of sufficient height and magnitude to be susceptible of private ownership. 7 Martin, N. S. 622.

“The jury to whom this question was submitted, decided in favor of the defendant, and negatived the allegation in the petition, that at the time of the sale from Conway, no batture existed in front of the lot in question. The evidence on this point is before us, and after a careful examination of it, we are unable to pronounce that the verdict was erroneous.”

Thus then, it is seen, that during a period of thirty years, there is a uniform current of decisions, recognizing the right of the riparian owner of city property to the alluvion attached to their soil. This is the jurisprudence of the State, and with a knowledge of that jurisprudence, our clients, and hundreds of other individuals, similarly situated have acquired property, which the plaintiffs value at twelve millions of dollars. This honorable court will pause before they will sanction a departure from the principles consecrated by so many decisions; and before they will suffer “hurly burly innovation” to throw us once more afloat on a sea of uncertainties, and to despoil a large class of honest and industrious citizens of valuable property, acquired in good faith, on which they have made great improvements, and the title to which was never before disputed.

Carter, for the plaintiffs, in conclusion, said :

The defendants rely upon four means to defeat our claim.

They say :

1st. Your rights have been passed upon, and the batture awarded to us, by the decision in the case of *Henderson et al.*, vs. Mayor et al. They therefore plead *res judicata*.

2d. The plaintiffs have acknowledged the title of the defendants by repeated acts ; and they cite in support of this position, various ordinances of the City Council.

3d. That, at law, the batture in a city belongs to the owners of the front lots, and not to the city.

4th. They plead prescription.

Upon the plea of *res judicata*, I shall not trouble the court with any observations. The able arguments of my colleagues upon this branch of the subject leave nothing to be said which can strengthen the positions they have taken, and from which, in my humble opinion, they have demolished the first barrier which has been raised by the defendants to defeat this action.

It has been admitted by one of the counsel for the defendants in this case, (George Eustis, Esq.,) and who appeared in the Supreme Court on behalf of the Mayor, Aldermen and inhabitants, in the case of *Henderson* and others, that he did not consider that case, when tried, as involving the question of *title to property*; and, with a frankness becoming his high reputation, he did not presume to invoke the decision in that cause, to maintain the plea of *res judicata* in this.

And how could any person, having the knowledge which that gentleman possesses of the case of "*Henderson et al.*," attempt before this court to persuade your honors that the title to the batture had been litigated and passed upon in that cause ?

He knew that the City Council had, by a solemn ordinance, which, like all the city laws, was published to the whole world, proclaimed its determination not to permit the rights of the public to the batture to be invaded with impunity ; that the

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attorney of the corporation was directed to maintain those rights, if necessary, by suit.

And who was the attorney thus directed? Mr. Moreau Lislet; a gentleman; who, from 1805, had at all times boldly proclaimed the doctrine that the alluvion in front of a city belongs to the city; a man who had, by word and writing, repeated this doctrine before courts, to clients, and to all who asked his opinion; and yet, if we are to believe the defendants, in one of the last cases which he tried, as the closing event of a long and honorable professional career, abandoned all his former doctrines upon the subject of batture, and admitted, what he had for thirty years contended against, that the batture in front of a city belongs to the owners of the front lots!

I pass on to the second defence; the repeated acknowledgments of the plaintiffs, that the front proprietors had title to the property in dispute. It is a matter of not much consequence at what period and how often the front proprietors may have been alluded to in the laws and ordinances passed by the City Council; nor is it a matter of any importance whether the allusions made to them in this way implied an admission of title. We contend that these admissions do not bind the plaintiffs, and cannot divest the public of their rights to the batture. Admissions of a similar nature were urged not many years since before the Supreme Court of the United States in a case in some respects like this.

It was then contended, as it is now, that the city of New Orleans had lost title to the property in dispute by its own acknowledgments of a title in another. Let us see how this doctrine was treated by the Supreme Court:

“ To show that the federal government has considered this common as a part of the public domain under the treaty, various laws of Congress have been referred to, and official proceedings by the agents of the government in reference to it. And also it is shown that the action of the government has been solicited by the city authorities, who, by these acts, it is insisted, have acknowledged the right of property in the United

States, as asserted in their behalf by the district attorney of Louisiana.”

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The Court goes on, and enumerates the various acts and doings relied upon by the United States, and thus concludes:

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“It must be admitted, that several of these acts are unequivocal in their character, *and do show an admission on the part of the city, not only that Congress had a right to legislate on this subject, but also to dispose of certain parts of the common in fee.* It is a principle sanctioned as well by law as by the immutable principles of justice, that where an individual acts in ignorance of his rights, he shall not be prejudiced by such acts. And this rule applies at least with as much force to the acts of corporate bodies as to those of individuals.”

But the Court does not stop there: “But, in addition to the consideration that the city authorities probably acted in ignorance of their rights, it may be safely assumed, *that they had not the power, by the acts referred to, to divest the city of a vested interest in this common.*” Mayor et al. of New Orleans vs. United States, 10 *Peters*, 732, 735, 736.

Mr. Livingston, who has proved of so much service to the defendants, was in this case the counsel for the corporation. He says, page 707: “The city, it is said, have, by various acts, acknowledged the right of the United States. They have petitioned for and accepted grants of the land; but this was done before they had discovered evidence of their title, and even if *done with a full knowledge of it, could never divest them of the property.*”

Without multiplying citations from law reports and writers, it may be, without any presumption, concluded, that the second means of defence is entirely unavailable.

We come to the defence on the merits, viz: That, at law, the owners of the front lots in a city are entitled to the bature.

In asking this Court to decide against this title of the front proprietors, and to acknowledge the title of the city to the

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batture, we seek to establish no new doctrine, or to ask a departure from those principles of law applicable to the subject, and which have been laid down repeatedly in your decisions.

It is believed that a careful examination of the batture cases decided by this court, commencing with the case of John Gravier vs. the Mayor et al., will demonstrate that the title we set up has been fully recognized by this court.

It was said by one of the counsel for the defendants, that they had purchased and held in good faith; that their title had been passed upon by this tribunal, and that it would almost amount to a species of fraud now to declare that title defective.

We think we will show that the defendants have not been possessors in good faith, and that the solemn declarations of this court had been promulgated long since to the people of this State, which plainly stated "that the owners of front lots in cities have no right to the batture." We seek to establish a distinction between the rights of the owners of *rural* estates and the owners of *urban* property to claim the batture which may be formed in front of their property.

By what right does the front proprietor claim the alluvion? The decision in the case of Morgan vs. Livingston et al., 6 *Martin's Reports*, and delivered by the now presiding judge, furnishes an accurate reply.

"The defendant's counsel contends, that the law of alluvion is not founded on principles of compensation, and to be supported on the maxim *qui sentet et onus debet sentire et commodum*, but that the riparian owner is entitled to the profit, because, from the nature of the increase, it is impossible for any one else to claim it." The learned judge repudiates this definition, and after citing authorities from various authors and from various countries, adopts the conclusion, "that he who bears riparian burdens is, in consequence thereof by the principles of natural law, entitled to the increase."

But what are the burdens and the exposure to loss which gives the right to alluvion? Following the decision rendered

in the same case, we find them clearly and accurately defined. See pages 235, 236, 237: "These lots are not charged with any of the burdens attending rural riparious estates; the levee, road or street, were made or kept in repair at the joint expense of every lot in the city, the farthest from the water contributing as much thereto as the nearest." The burdens, then, which in Louisiana are imposed upon the owner of riparian property, are the making and keeping of the levee, and the furnishing and keeping of a road between the levee and his land for the use of the public. His exposure to loss is this: the river may wash away the levee and the road, and then he must furnish a new levee, and yield additional land for a new road.

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Starting, then, with this clear definition before us, upon which the right of alluvion is founded, let us proceed to examine the first batture case which is to be found in our reports, John Gravier vs. the Mayor, Aldermen and inhabitants of the city of New Orleans.

In 1804, Gravier, finding the alluvion in front of the faubourg St. Mary, (now constituting a portion of the Second Municipality,) of sufficient value and extent to justify the expense, threw up a dyke, enclosing a portion of about five hundred feet square. The people and authorities of the city of New Orleans felt indignant at this conduct, and alleged title to it. Gravier commenced suit against the city, and prayed that the corporation might set forth under what title they claimed this alluvion, that he might be quieted in his possession, and the city be perpetually enjoined from troubling him.

The city rested its title chiefly on this ground, that Bertrand Gravier, the ancestor of John, had *abandoned it to the city*, and since then the levee had been kept up by the city.

What did the Superior Court decide? I quote the very words of the judgment: "It is, therefore, important to inquire, what was the situation of the batture at the time the faubourg was established, or when the front lots were sold; *for if no alluvion had existed at that time*, when Bertrand Gravier

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ceased to be the owner of the land adjoining the high road, then it is the opinion of the court, *that an alluvion subsequently formed* would not become the property of Bertrand Gravier. The reason of this opinion is, that if Bertrand could be considered as the proprietor of the road after selling the adjacent land, or of the levee lying between this road and a public river, he would, nevertheless, not possess that title of property which gives the right of alluvion, *for the destruction of this property by the encroachment of the river, would be a public, not a private loss*, and the said road and levee would have become necessarily liable to be kept in repair at the public expense.

“It is, however, the opinion of the court, from the evidence adduced in this case, *that antecedent to the time when Bertrand Gravier ceased to be the proprietor* of the land adjacent to the public road, a batture or alluvion had been formed adjoining the levee, in front of the faubourg, upon the river, and that this alluvion was then of sufficient height to be considered as private property.” *Harrison's Condensed Martin Reports, vol. 1, pp. 453, 454.*

Much stress has been laid upon this case, as admitting the doctrine that the owners of a front lot in a city are entitled to the batture, but most certainly not one word can be pointed at in the decision which justifies such a conclusion. The court decided that no abandonment had been made by Gravier to the city; that, antecedent to the time when the plantation was laid out into a faubourg, the alluvion claimed by John Gravier was in existence, and then susceptible of ownership by the owner of the plantation; and upon the proof adduced, which they considered maintained these positions, they decreed to John Gravier the five hundred feet of alluvion so formed, and that he be quieted in his possession.

Is there any single feature in that case similar to this? Was the batture, now existing outside of Front street, in existence when Madame Delord and Mr. Saulet laid off their rural estates into faubourgs? It is admitted that it has come into ex-

istence within a few years past ; and if the levee and the front street should be washed away, on whom falls the loss ? To use again the language of the Superior Court : " The destruction of this property, by the encroachment of the river, would be a public, not a private loss." And here comes in that just principle of relief that he who is liable to suffer the loss, shall reap the benefit of any gain.

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The next case to which the attention of the court is called, is *Morgan vs. Livingston et al.*, 6 *Martin's Reports*. It will be perceived that the right of the city to the batture was most studiously kept out of view by both parties. It was a contest between the owners of the front lots in the faubourg St. Mary, against Livingston et al., who claimed under Gravier, and alleged, that the batture had not passed from Gravier to the owners of the front lots. And here again the distinction between rural and urban property was fully stated. It was declared that the owners of the front lots were burdened with riparian duties, and so long as they discharged these burdens, the increase by alluvion belonged to them.

At that time the front proprietors were called upon to furnish roads and make levees at their own expense ; and although the title of the city, might, on various grounds, have been, with great propriety, placed for the decision of the court, yet no attempt was made to make the city a party to these proceedings.

Although Livingston had been able to obtain a decree of the Superior Court, in the case of John Gravier, that antecedent to the year 1788, when the faubourg St. Mary was laid out, a batture existed, susceptible of private ownership ; although when the sheriff attempted, in 1808, to put Gravier in possession of this property, he found it covered by water to the depth of three or four feet from the natural rise of the river in its ordinary state ; yet in the case of Morgan, he received the first check to his batture speculation, which, for his own honor and reputation, and for the rights of the citizens of New Orleans, it would have been most fortunate had it been administered in 1807 by the Superior Court of the Territory of Orleans.

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I come to the case of Packwood vs. Walden, 7 *Martin, N. S.*, 81. The plaintiff alleged, that the property held by the defendant belonged to the public ; he claimed it as private property, the use of which belongs to all, the right of soil to none, either individuals or bodies politic. It is proper, as strengthening the explanation made of the decision in the case of Gravier vs. the Mayor at al., to quote from the case of Packwood the very words of Judge Mathews in alluding to it, especially as he was one of the judges of the Territorial Superior Court: "The first title under which this property was claimed is that supported by a judgment of the Superior Court of the late territorial government. The decision of that case, as far as relates to facts, is based on evidence which proves that a batture in front of their ancestor's plantation existed, to the whole extent of said front, capable of being reclaimed from the river, and was a proper subject for private ownership at the time he established the faubourg St. Mary."

The judge then alludes to the case of Morgan vs. Livingston et al. "The next case in which the rights and titles of individuals were brought in question relative to this batture is that of Morgan vs. Livingston et al. The controversy was between the proprietor of a front lot, who claimed by right of alluvion, and a purchaser from the heirs of B. Gravier. Testimony was introduced which showed that no alluvion existed at the time of the sale from the original owner to his immediate vendee. Nothing in the evidence established the period when the alluvion might have been considered of sufficient elevation to become private property. *The cause was decided on principles applicable to rural estates.*" At page 91, the learned judge, after citing and examining various authorities, says: "In conformity with the provisions of the law first invoked, it must be inferred that a city can acquire *jure alluvionis*, and land thus acquired becomes the property of the whole community ; it is *propria civitatis*, and may be sold, alienated and destined to private uses by the legal authorities of the city.

In alluding to the last case to which I shall refer the Court,

permit me to quote from the very able opinion delivered by the Judge of the Parish Court :

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“The case of *Cochran vs. Fort et al., Martin*, 7 N. S. 622, is probably, of all those decided by our Supreme Court, the one that bears most directly on the questions before us. In that case, the whole of the evidence taken in all the previous batture cases was, by consent of parties, laid before the court, and the argument on the law involved in those cases is declared to have been able and elaborate. In that suit, the most important point decided, inasmuch as the decision applies to the case before us, is, that the plaintiffs, in order to recover from the defendants, must show a batture created between the day of their purchase and the date of the act of incorporation, which was susceptible of ownership; for if the alluvion was formed afterwards, it became the property of the city, and not the front proprietors. But the defendants have most earnestly insisted, that the passage just quoted, of the judgment of the Supreme Court, ought to be considered as a mere *obiter dictum* of Judge Porter, who delivered the opinion. Was it really an *obiter dictum*? And, first, what is an *obiter dictum*? If I understand the expression right, it means a *by-the-way phrase*, an opinion expressed *en passant*, without much reflection, but, at all events, in a circumstance which did not call for the expression of such an opinion. Now, was it under such a circumstance that the phrase, or rather the principle above quoted, was uttered in deciding the case of *Cochran vs. Fort et al.*? Certainly not. In that case the plaintiff claimed the property and possession of a certain batture from the defendants, upon a title by them set out, and the defendants, denying the plaintiffs’ title, set up an adverse one. The evidence convinced the court that, at the time the plaintiffs purchased from Hevia, there was in front of the lot purchased a batture of sufficient height to be susceptible of private ownership, and that the same had not been purchased by the plaintiffs; but the court, after expressing that opinion, the correctness of which, from the clashing of the testimony,

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they consider as, perhaps, admitting of some doubt, they go further; and, supposing their opinion as to the evidence to be incorrect, and assuming the plaintiffs' position, that at the time they purchased from Hevia there was not, in front of the lot, a batture susceptible of private ownership, they say the plaintiff's case could not be made stronger. The faubourg was incorporated two years afterwards. To enable them, therefore, to recover in this action, they must show a batture created between the day of their purchase and the date of the act of incorporation, which was susceptible of private ownership; for if the alluvion was formed afterwards, it became the property of the city, and not of the front proprietors."

It was argued by one of the learned counsel for the defendants, that when cases arise before this court, and it is apparent that there is a third party having a better title to the object in dispute than the parties litigant, that you are bound by every principle of law and justice to maintain his rights, and dismiss the parties before you.

Such a doctrine, I apprehend, will not be tolerated by this court; and although it apparently has received the support of an ingenious and talented advocate, is not destined to form a rule of conduct for any intelligent legal tribunal.

Courts of justice must decide cases as they find them. They must look to the record, and their decision cannot go beyond the merits of the case presented for the exercise of their judicial powers.

In no case till the present has this Court had an opportunity to pass directly upon the law which we contend gives the batture to the city.

In the case of John Gravier, the Superior Court of the Territory could not decide the question, because the testimony showed that the batture in dispute had been formed *antecedent to the time when Bertrand Gravier, in 1788, laid out the faubourg St. Mary.*

In the case of Morgan *vs.* Livingston et al., they treated the property as *rural*, and in fact, at that time, the owner of the front property was burdened with riparious duties.

In the case of *Packwood vs. Walden*, the plaintiff showed no title, and the title he set up was not for the city.

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But in the case of *Cochran vs. Fort et al.*, the parties were distinctly told that there was another party having title stronger than either, to wit, the city.

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I have shown you the opinion of Judge Mathews, in the case of *Packwood vs. Walden*, who was one of the Judges who decided the case of *Gravier vs. the Mayor et al.* I have shown you the opinion of Judge Martin, in the case of *Morgan vs. Livingston et al.*; and, lastly, the solemn enunciation by Judge Porter, in the case of *Cochran vs. Fort et al.*, concurred in by Judges Mathews and Martin, *that the title to the batture was in the city.*

On the faith of these solemn decisions, delivered at different times during the last thirty-five years, did I rest the opinion which I gave to my clients, and which led to the institution of this suit. I believed, and still believe, that the opinions of these learned Judges, one of whom presided on the bench more than a quarter of a century, another of whom was a prominent member for near twenty years, and the other, having taken his seat in 1810, now, as presiding Judge, maintains the high position accorded to him by the wise and learned, of being the first civilian of our country, were entitled to my concurrence. I repeat, that I believed, that the opinion of these expounders of the law, two of whom had been acquainted with the commencement and progress of the batture litigation, who had enjoyed the opportunity of hearing all the discussions upon the law of batture from the lips of the ablest lawyers at the bar of Louisiana—such men as Livingston, Moreau Lislet, Mazureau and Derbigny, had sufficient knowledge, experience and opportunity to acquire correct information upon this deeply important subject. It cannot be in error if I submit to their doctrines, and give full credence and faith to them, when pronounced in the most imposing manner, to wit: in the decisions of the Supreme Court of this State.

Against this tide of authority it is attempted to oppose the opinions and arguments of Edward Livingston. No man re-

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verences more than I do his learning, pre-eminent talents, and the high reputation awarded to him as one of the first jurists that this country has produced.

But, in all the batture cases in which Mr. Livingston appeared, we find him *arguing his own cause*. In the case of *Gravier vs. the Mayor et al.*, he was in fact the plaintiff, because he had purchased previous to the suit, a portion of Gravier's claim to the batture. In the case of *Morgan vs. Livingston*, he was the defendant. In the case of *Hermann vs. Livingston*, he also appeared in the same character. The Judge of the Parish Court very happily alluded to the authority to be yielded to Mr. Livingston, in connection with the question of batture. He says: "The defendants have greatly relied upon the authorities cited by Mr. Livingston in his memorial in answer to Mr. Jefferson, as reported in the Law Journal, volume 5, in which he contends that alluvions, by the Roman law, accrued to urban as well as to rural property. That the opinions of so distinguished a jurist as Mr. Livingston was should be entitled to much weight on a general subject, which he might have treated of *ex professo*; that those opinions by him, if embodied in a treatise, written with the sole view of advancing or illustrating the science of law, should be entitled to much consideration, no one is less disposed to deny than myself; but it must be remembered that the opinions and quotations which the defendants now cite as authority were urged by Mr. Livingston in a case of his own, in which he contended for the very principles that the defendants now contend for, a case, too, of the utmost importance to him; that they were addressed, not to a court of justice, but to the nation at large, with the view of showing that the President of the United States had committed an arbitrary act against him, and that their not being answered cannot be assumed as a proof that they were unanswerable, but merely as an indication that no one was disposed to answer them; finally, that it is to be supposed that, when advocating his own cause, Mr. Livingston took care not to quote any of the authorities which could militate against it."

[On coming to a decision in this case, Judge MARTIN EASTERN DIS. dissenting, the Judges delivered separate opinions. The April, 1841. principal opinion and decision of the majority of the court was delivered by Judge BULLARD; the others, excepting the MUNICIPALITY dissenting Judge, concurring. Judge GARLAND accompanied NO. 2. his concurrence in the judgment, with additional arguments vs. and reasons.] ORLEANS COTTON PRESS.

Bullard, J.—In this cause, the court has had the advantage of an able and elaborate discussion on both sides, as well in writing as oral, in which have been displayed the great resources of the Bar in ability and varied learning. We have been enabled at our leisure to weigh the arguments and examine the authorities on both sides, and to give to the whole subject that patient and dispassionate consideration due alike to the vast interest at stake, to the character of the parties and to public expectation. It would have been more satisfactory to ourselves if we could have been unanimous as to the final result; but as there exists some difference of opinion among the Judges, I proceed to pronounce mine, and to set forth the grounds and reasons upon which it rests. I will not affect to conceal with what anxiety I examined again and again the principal question in the case, when I discovered that I should have the misfortune not to concur with the senior Judge, who had been for so many years familiar with the vexed question of the batture in all its phases, while this is the first occasion, upon which it has been discussed, since I have been a member of this tribunal.

The Municipality claims to be owner of the alluvial formation fronting the suburbs Delord and Saulet, between New Levee street and Front street, bounded on the upper side by Rofignac street and by property in lots separating it from Benjamin; which lot or parcel of land, it is alleged, was formed by alluvion long after those suburbs were laid out as faubourgs of the city of New Orleans, and after they were actually attached to, united with, and incorporated into, and made a part and portion of the city of New Orleans, or was at each of the

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said epochs, so inconsiderable in its formation and extent as to be incapable of individual possession, use or occupation of any kind whatever, without the use of artificial means, the same being even at the lowest stages of the water of the river barely perceptible, and all the rest of the year entirely covered and forming a part of the bed of the river—by reason of which incorporation with said city (the petition goes on to allege) and the laying out and dividing the said land, of which the said faubourg is composed, into town lots, streets, &c., as a part of said city, the title to all the said batture or alluvion then so imperfectly formed or thereafter to be formed, *became by law vested in the corporation* of the said city of New Orleans, for the sole and exclusive use of the public and is now vested in the plaintiffs.

Upon the lot of ground thus described, it is alleged, the defendants have erected buildings and stores for pressing cotton, &c., and have appropriated the same to their sole and exclusive use as their property, and to the entire exclusion of the public and have converted the natural and lawful destination of the said land to public purposes and uses into private property.

It is further alleged that within the last ten years there has been formed in front of the lot of land above described, by gradual deposit of the river, a considerable space of batture or alluvion, now vacant and unoccupied except for public uses, and which is in like manner vested in the said Second Municipality for public use and benefit, and that the defendants, pretending to claim the same as their private property, and as forming a part of the ground described, have menaced and, as the petitioners believe, are about to occupy the same and to convert it to their own use to the exclusion of the public.

The plaintiffs conclude by praying judgment that the title is vested in the plaintiffs for the uses and purposes above mentioned, and that the defendants be forever enjoined from any use, occupation or possession thereof and for damages.

The defendants first pleaded the exception of *res judicata*

founded upon the judgment rendered in the case of Henderson and others vs. the Mayor, Aldermen and inhabitants of the City of New Orleans; and in case the same should be overruled, they deny all the facts and allegations in the petition so far as they assert any color or pretence of title in the plaintiffs to the premises described: and they deny the plaintiffs' title to any alluvion already formed or which may hereafter be formed in front of said premises.

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The respondents further aver, that they are the riparian proprietors of the property claimed by the plaintiffs, and as such entitled to all the alluvion which has been formed or may be formed in front of their said property. That they possess the same with all its rights and privileges, and especially as a part thereof, the right of alluvion, in virtue of a sale or concession of the King of France. That the said property with all its said rights was vested in these respondents, and those through whom they claim, from the date of the said sale or concession and that they cannot be divested of their right without their consent, and without a just and previous indemnity. They further aver that the plaintiffs have repeatedly admitted and recognized their right and title by formally putting them in possession of sundry portions of batture successively formed before their property and attached thereto since the incorporation of the city in 1805, by charging them with all the burdens and duties of front proprietors, and by various other acts by which the respondents' right is distinctly recognized.

Upon these pleadings the parties went to trial in the court below, and the exception of *res judicata* having been sustained as to the lots of ground first described, upon which the defendants had erected their warehouses, and overruled as it relates to that portion of the alluvion lying on the outside of the levee and in front of the same property; and after a trial upon the merits, judgment having been rendered in favor of the plaintiffs for the land last described, according to the prayer of the petition, the defendants appealed.

The Municipality has not appealed from that part of the judg-

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ment sustaining the exception of *res judicata*, as to that portion of the property in controversy upon which the defendants' buildings are erected, but they ask a modification of the judgment in that respect. We have therefore first to enquire into the question whether the judgment in the case of Henderson and others against the Mayor, Aldermen and inhabitants of the city of New Orleans forms a bar to this action, as carrying with it the authority of the thing adjudged between these parties.

A careful examination of the arguments and authorities on this point has failed to satisfy my mind that this exception ought to have been sustained in the court below. It appears to me so doubtful that I think the judgment in this particular should not be disturbed, and that the whole case is fairly open before us on the merits, on the answer to the appeal.

Proceeding, therefore, to examine the case upon the merits, I begin by assuming as undisputed facts, that the Jesuits' plantation, of which the lots in rear of the premises in controversy formed a part, was from its local situation, fronting on the Mississippi, and exposed to abrasion by its currents, entitled to any alluvial accretion upon its front, and that such was the condition of things in 1805, when the city of New Orleans was incorporated by an act of the Territorial Legislature, and the property in question embraced within its limits. That in 1806 or 1807 a part of the land was laid out as the faubourg Delord, and lots sold in conformity to the plan. Such being the case, if the same land or that part of it which still fronts upon the river has ceased to enjoy the same advantage, to the profit of the owners of such front, or has lost the right of accretion, and since that period the alluvion formed belongs not to the owners of the front lots but to the city, such a change—such a dismemberment of the property must have resulted either from the operations of law, or from the consent of the former or the present proprietors. It would seem, therefore, that the enquiry before the court is twofold—*first*, into the effect of the act incorporating the city and embracing the property in question, now composing the

faubourgs Delord and Saulet within its limits, and *secondly*, whether the laying out of the faubourg as shown by the plans and disposing of lots in conformity thereto, or any other acts of Madame Delord or her successors, taken in connection with the various ordinances of the City Council, furnish sufficient legal evidence of an intention, on her or their part, to dedicate the property claimed by the plaintiffs to public uses, so as to constitute a *locus publicus*. Under the first head I will consider merely the legal operation of the act of 1805, wholly independent of the will of the then proprietor, and how far the character of the property was changed thereby from rural to urban, so far as it regards the right to profit afterwards by any alluvial increase; and under the second, I will consider the effect of the same act, together with the several ordinances of the City Council, and especially that of 1831, by which a part of the faubourgs Delord, Saulet and Lacourse were finally incorporated, as it is termed, that is to say, admitted to all the advantages and subjected to all the burdens of the square of the city, taken in connexion with the acts and declarations of the parties.

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I. If the act of 1805 which incorporated and defined the limits of the city of New Orleans, embracing a large extent of territory from Lake Pontchartrain to the river and numerous plantations fronting on the Mississippi, and all previously entitled, according to the existing laws, to any alluvion which might be formed upon their front, had declared in explicit terms, that after the passage of that act, the owners of such tracts of land fronting on the river should no longer be entitled to any alluvion which might be formed, but that the same should thereafter accrue to the benefit of the city, there is not perhaps a single mind, capable of discriminating between the legitimate exercise of legislative authority and acts of sheer spoliation, that would not pronounce such an enactment to be without any constitutional validity. Will it be said that the right to future alluvial formations is not a vested right? I answer that such right is inherent in the property itself and forms an essential attribute

The right to future alluvial formation or batture is a vested right, inherent in the property itself, and forms an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches.

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of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural fruits of a tree belong to the owner of the land; and that such an attempt to transfer from the owner of the land to the city, the future increase by alluvion, would be as legally absurd, as if the legislature had declared, that after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city and not to the owners of the orchards and gardens. If such would be our judgment upon an express enactment, *a fortiori*, should we declare that such an effect could not follow by mere implication.

But the argument is, as I understand it, that the character of the property was changed from rural to urban by the incorporation of the city; and inasmuch as urban property does not by law enjoy the right of alluvion, as is contended, consequently after that period, the city is entitled to the increase and not the front proprietors.

Admitting for the present, and for the purposes of this argument, that by the Roman and Spanish law, the right of alluvion is not enjoyed by urban estates, and that they form an exception to the general rule, yet it appears to me the same difficulty recurs; for if the legislature without my consent places my property in a new category or gives it a new classification, or in consequence of which it is shorn of one of its original attributes, it is not easy to distinguish such an act from one by which the same result is sought to be obtained by direct enactment. It is after all but a circuitous way to the attainment of the same end and is equally repugnant to the first principles of justice, and to all constitutional restraint upon the legislative power. This argument presupposes that the original tract was entitled to alluvion, and I now speak only of the effect of the act incorporating the city and extending its limits so as to embrace the Jesuits' plantation; without regard to any subsequent acts of the front proprietors, from which an intention to dedicate to public uses might be inferred, and it appears to me, that in truth the act of incorporation might be

laid entirely out of view and our inquiry confined to the evidence of dedication—on this point, the court I believe is unanimous.

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But supposing these principles are questionable, and that I am mistaken in this view of the subject, is it true that urban property fronting on the river is not entitled to alluvion, and that such an exception is recognized by the Roman or the Spanish law? This question leads me briefly to look into the doctrine of alluvion, its foundation and its limitations and exceptions. The doctrine, in my opinion does not cover a very wide space, and in this discussion, the question as it has been treated, and as I propose to treat it, becomes one rather of language and philology than of law.

The Roman legislator instead of giving the more exact and scientific definition of our modern Codes, announces with oracular brevity a great rule of natural equity; “*Prætereà, quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur,*” which I translate as follows: “moreover, whatever the river has added to your land becomes yours by the law of nature, (or nations)”. I use the English word *land* instead of *field*, because it appears to me that the word *ager* in the text is employed in its primitive sense to signify land or soil in the abstract, without regard to any idea of property or to any particular form or size, or shape, precisely as it is in the Greek, from which it is derived, (AGROS) and as it is in the compounds into which it enters both in Latin and several modern languages, such as “*agricultura, agricola, agrarius, and agrimensor.*”—It will not be pretended that agriculture is confined in any language to the culture of a *field without a house or other building upon it*, as the word *ager* signified according to Rodrigues and even the Roman Digest. The language itself furnishes internal evidence that such was its primitive meaning, for the earliest as well as the most useful of human arts, that which in a great measure feeds and clothes the great family of man, derives its name from that word in combination with another which signifies to *cultivate*.

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Again, alluvion is a right founded on natural law, in which the maxim certainly applies with all its force, that where the reason is the same, the law is the same, and would that law distinguish between two contiguous estates or tracts of land fronting on a water course, and equally liable to be wasted by its encroachments, deny to that which should have a building upon it the natural chances of accretion, while it gives it to the other? I think not, any more than agriculture should be taken to mean the tilling of a field on which no edifice exists. That the word *ager* was sometimes employed to signify something different there is no doubt, and so is land in English; its primitive signification is *soil, ground*; but it sometimes means a country or territory, as "the land of my fathers," "the land of Canaan." This arises from the poverty of human language and the impossibility of having a distinct word to signify every object in nature, and all the infinite varieties and shades of ideas. The Roman language at an early period was as poor as the Roman people.—Witness the fragments of the twelve tables which it requires a profound antiquarian to decipher.—But it adopted new words, with as much avidity as the Romans accorded to subject tribes the rights of citizenship; and we have the authority of Horace for saying that even in the Augustan age new words were always welcome, provided they flowed from a Grecian source.

"Et nova factaque nuper habebunt verba fidem, si,
Graeco fonte cadant, parcè detorta."

Not only the same word came to have different significations, but new and sometimes odd combinations of words were resorted to in order to express new ideas or objects. The word *prædium*, for example, about which so much has been said in the course of this argument, is supposed to have been derived from the word *præda*, which means *plunder*, because it was originally an allotment of land, the *spoils* of conquered tribes; as the word *plunder* among a certain class of our citizens is used to signify the scanty chattels of the poor.

Much stress is laid upon the definition of *ager*, in the Par-

tidas (law 8, tit. 33, Par. 7) to prove that it was only fields without buildings on them, which enjoyed by the Roman law the right of alluvion. It is true the Partida says it means in Latin "como campo para sembrar en que no ha casa ni otro edeficio, fueras ende alguna cabaña ó choça para cobrar los frutôs." The authority of even Alphonso the wise, to fix by statute the meaning of a Latin word may well be questioned. That it did not always bear that narrow meaning, and sometimes signified *land* or soil in general, is manifest from the usage of the best authors. Virgil, for example, speaks of Sichæus the first, husband of Dido, as "ditissimus agri Phœnicum"—meaning as I understand it, the richest of the Phœnicians in land—and afterwards of Camertes as the richest of the Ausonians in the same species of property.—It is probable each had something more than a field without a house—Æneas was promised in his future empire "a rich exuberance of soil—"divitis uber *agri*." In the first book of the Georgics we find within the compass of a few lines the words *tellus*, *arvum*, *ager*, *terra*, and *campus* used, as nearly synonymous. But in the following lines I think the word *ager* is most manifestly used as contradistinguished from *arva*, which we all know means *fields*; the *soil* is represented as parched with heat, while little streams are conducted so as to irrigate the *fields*; so that *ager* implies more than one field.

" Et cum exustus *ager* morientibus æstuat herbis,
 Ecce supercilio clivosi tramitis nudam
 Elicit : illa cadens raucum per levia murmur
 Saxa ciet, scatebrisque arentia temperat *arva*."

But without relying too much upon the authority of the poets, we have that of Niebuhr, one of the most profound scholars and acute philologists of modern times, and who had made the agrarian institutions of Rome the subject of long and laborious investigation. This authority, I venture to say, is worth all the lexicographers, whose works have been consulted and referred to in argument. In an appendix to his second volume of the history of Rome, he gives us much information

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concerning the Roman mode of partitioning landed property, the limitatio or survey, and the peculiar terms of the ancient national law.—He says, “*ager*, a district, was the whole territory belonging to any civil community, in opposition to *terra* a country, which comprised many such proprietary districts; as for instance, *terra Italia, Græcia*.—All landed property (*ager* in its restricted sense,) was either Roman or foreign—“aut Romanus aut peregrinus.”—All Roman land was either the property of the State (common land, domain) or private property—“aut publicus aut privatus.”—The public domain is always called *ager publicus*, there was also *ager vectigalis*, and *ager municipalis* according to the same author, and mentioned in the *Pandects*.

But the text of the *Pandects* shows that the word *ager* in reference to this subject of alluvion was used indiscriminately with *Fundus* and *Prædium*. In three successive paragraphs these words are thus used:

1st. Prætereà quod per alluvionem agro nostro Flumen adjecit jure gentium nobis acquiritur.

2d. Si vis fluminis partem aliquam ex tuo prædio detraxerit et meo prædio attulerit, halam est eam tuam permanere.

3d. Planè si longiore tempore fundo meo hæserit arboresque quas secum traxerit in fundum meum radicis egerit; in eo tempore videtur meo fundo acquisita esse.

It will hardly be contended that in these three paragraphs the three different words employed imply as many different kinds of estates. Indeed throughout the whole remainder of the first title of the 41st book of the *Pandects* which treats of Islands formed of the beds of rivers becoming dry in consequence of a change of course and returning again to the same channel, the words *ager*, *prædium* and *fundus* are used indiscriminately, indicating rather a difference of style among the different jurisconsults who contribute to that great work, than any essential difference of landed property upon the margin of the streams. In no part of it do I find any exception to the right of alluvion, unless it be that established by

the law *in agris limitatis*, of which I shall have occasion to speak presently.—It is essential that the land should be bounded on one side by a water course, but it would seem to have been immaterial by what name the riparian estate was called.

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Cities may acquire jure alluvionis, it is contended. This I do not doubt, but then it must be as proprietor of the front or as riparian proprietor. It would be absurd to say it could be otherwise, for that is of the very essence of the right, the alluvion is but accessory, the front tract is the principal—the former cannot exist without the latter.

Cities may acquire *jure alluvionis*, but it must be as owner of the front, or as riparian proprietor; for the alluvion is but an accessory to the principal estate or land.

But to return to the law *in agris limitatis* which is greatly relied upon to show that cities may acquire jure alluvionis in some manner not easily understood. Such a construction of that law is apparently countenanced by what fell from the court in the case of Packwood vs. Walden, 7 Martin, N. S. 9, in which it was said, “according to the law of the Roman Digest *in agris limitatis*; although the right of alluvion is denied to fields of that description, yet it is granted to land on which a city is founded.” I think this an error arising from a hasty consideration of that law, and a translation manifestly erroneous. The text is as follows: “In agris limitatis, jus alluvionis locum non habere constat; idque et Divus Pius constituit. Et Trebatius ait, agrum qui hostibus devictis ea conditione concessus sit ut in *civitatem veniret* habere alluvionem neque esse limitatum. Agrum autem manucaptum limitatum fuisse ut scieretur quid cuique datum esset, quid venisset, quid in publico relictum esset.

The translation of this law as given by the senior counsel of the plaintiffs is as follows: “It is certain that the right of alluvion does not take place in limited fields. This has been decided by a constitution of the Emperor Antoninus; and Trebatius says that land taken *from a conquered enemy* and conceded *under condition of belonging to a city* enjoys the right of alluvion, and is not considered as limited, &c.”

This translation is certainly justified by that of Hulot into French, who appears to consider the expression “*ea condi-*

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tione concessus sit ut in civitatem veniret," as expressing a grant to a city of land taken from the enemy. But such a construction is in my opinion, contrary to the idiom of the language, as well as irreconcilable with the history of the times, to which it refers. If it had been the intention to express a concession to a city, the word, expressing the grantee would have been in the dative, *civitati*, perhaps more properly, *urbi*. If, as is supposed by the plaintiff's counsel, the city is the grantee, the words *eâ conditione* are not only surplusage, but they make nonsense of the passage. Does the grantor make a condition with the grantee, that the thing given shall belong to the latter? If A. gives to B. a tract of land, it belongs to the donee without any such condition. There *can* be no condition in such a case; with whom would it be stipulated? With the grantee? Then you would do so vain a thing as to make the grantee or donee consent to a condition, that the thing should belong to himself, which is already his by the donation or grant. If, on the other hand, we suppose the grantee to be understood indefinite, or not named with a condition that the land should belong to a city, no reason can be imagined, why a nominal grantee should be interposed, when the grant is to take effect in favor of a city. On the contrary, in my opinion the words "*ut in civitatem veniret*," establishes a condition of reversion to the Republic, whether we consider the concession as meant in favor of the conquered enemy, by leaving them in possession, subject to the will of the State, and *devictis hostibus* in a dative, or to an indefinite grantee under the same condition of reversion, and the same words in the ablative, merely expressive of the fact that the land had been taken from a conquered enemy. De Bréau Neuville, the learned translator of Pothier's Pandects, considers the sense of the passage to be, that lands given back to the conquered enemy on condition of reverting to the Republic, enjoy the right of alluvion, and are not limited. Such a translation accords also with the practice of the Republic at that remote period. Pothier, in a note to this law and its context, re-

marks, that when lands were taken from an enemy, the possessors of such lots, when passing under the denomination of Rome, were sometimes permitted to retain a part; another part was distributed to the veterans, and another part was sold, deducting that which was left to the ancient proprietor; but every part of those lands thus distributed were measured and bounded, and hence were called *limitati*.

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But the most satisfactory authority upon this as well as other points of the Roman land law, is Niebuhr. In speaking of the *Limitatis*, this author says, "according to the Agrarian Institutions no land was held to be marked by boundaries, save what had been divided in conformity to the practice of the State, and to that mode of observing the Heavens which was adopted in taking auspices. Every other kind of boundary was regarded by the Romans as indefinite. The subject treated of by the *Agrimensores*, is land thus marked out: other land they only mention by way of contrast. Every field which the Republic separated from the common domain, was marked out by boundaries: no separation could take place without such a demarkation; and whenever there were any traces of the latter, although particular estates within the region subjected to it might still be a part of the domain, it was yet a certain proof that such a separation had taken place. On the other hand every municipal as well as every foreign region was held to be without boundaries, (*arcifinious*) or merely limited by natural or arbitrary land-marks." "The land which was regularly limited and that which was indeterminate in form along with all the other characteristics of Quiritary property, had both of them that of being free from direct taxes, but their value was registered in the census and tribute was levied accordingly. In other respects the limited fields had certain legal peculiarities, concerning which, scarcely any other express statement is preserved, than that they had no right to alluvial land, the determinateness of their size being the condition of their existence."—History of Rome, vol. II. appendix I.—By Niebuhr.

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The same author further demonstrates that the *limites* which separated these agri limitati were not imaginary lines and stakes or land marks, but spaces of different widths, according to the size of the squares, left forever open and public as highways. They were marked out according to a system, of which the author gives the general outlines in the following words: "The principle of the Roman *limitatio* was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots of land which were transferred from the public domain to private property, and to fix immutable boundaries for them. Hence these boundaries (the *limites*) were marked by a slip of land left for the purpose, untouched by cultivation, as balks or ways; as their extremities were by a row of stones inscribed with numerals." Ibid.

Such appears to have been the ancient law, not as introduced or first established, but rather confirmed at a later period by a constitution of Antoninus Pius; for Trebatius, whose opinion is given, was himself a contemporary of Cicero.

There is a further passage in Niebuhr which tends to illustrate the clause "*ut in civitatem veniret*," which I cannot forbear to quote. "There was," says he, "a by-class in the Roman system, when the Republic restored a conquered territory to its old inhabitants, subject to the payment of a *tithe* or some similar tax; this, as long as the precarious possession lasted, was like any other impost, but *the Republic had the right of claiming the land and turning out the possessors*."

There is nothing in the Roman law which restricts the right of *alluvion* to particular localities, or portions of land, having particular names; but the right depends on the question whether the land had fixed and invariable limits or a natural boundary on one side by a water course.

After the most attentive consideration of this part of the case it appears to me there is nothing in the Roman law which provided that the right of alluvion was restricted to land or portions of land bearing particular names or having particular localities, but the right depended altogether upon the question whether the tract had fixed and invariable limits or a natural boundary on one side at least, liable to be affected by a water course—no matter whether it bore the name of ager, prædium or fundus, nor do I find that cities formed any exception to the general rule.

But the counsel for the plaintiffs endeavor to fortify their position by the aid of law 26, title 28, Partida 3d. It is in the following words :

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“ Crecen los rios à las vegas de manera que tuellen e menguan a algunos en las heredades que han en las riberas dellos e dan, e crecen a los otros que las han de la otra parte. E porende decimos, que todo quanto los rios tuellen à los homes poco à poco, de manera que non pueden entender la cantidad della porque no lo llevan ayuntadamente, quo lo gañan los señores de aquellas heredades, à quien lo ayuntan, e los otros a quien lo tuellen non han en ello que ver. Mas quando acaeciesse, que el rio llevase de una heredad ayuntadamente, asi como alguna parte della *con sus arboles*, ó sin ellos, lo que asi llevase non gañan el señorío dello aquellos á cuya heredad se ayunta ; fueras ende, si estuviesse y por tanto tiempo que raigassen los arboles en las heredades de aquellos á quien se ayuntasen ; ca estonce ganaria el señorío dellos el dueño de la heredad do raigasen, pero seria tenudo de dar al otro el mercoscabo que recibio porende, segun el aluedrio de homes buenos, et sabidores de lauores de tierra.”

This law is nearly a paraphrase of the Roman law *præterea* and the following in which the words *ager*, *fundus* and *prædium* are used without distinction. The word *heredad* is used in the Spanish text to express the riparian property or land entitled to alluvion, and the counsel contends it must bear the same narrow meaning which they give to *ager*, to wit : a field without a house. *Heredad*, in Spanish, I understand to mean a landed estate, and the text might well be translated by using that English word corresponding to the French word *heritage*. Thus the word conveys the same idea expressed in the *original* law of the Digest by the words *ager*, *fundus* and *prædium*. I say the original, because the wisdom of Alphonso was after all in a great measure but reflected light, whose source was the Roman law, and which was sometimes not a little refracted by passing through a Gothic medium.

The plaintiffs next invoke the 9th law of the same title of

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the 3d Partida, as giving in express terms to towns and cities the alluvion which is formed in front of cities. The law is as follows :

“ Apartadamente son del comun de cada una ciudad ó villa, las fuentes e las plazas o fazen las ferias é los mercados á los lagares ó se ayuntan à consijo é los *arenales* que son en las riberas do los rios e los otros exidos e las carreras á corren los caballos, e los montes e las ochesas e todos los otros lagares semejantes d'estos, que son establecidos é otorzados para pro comunal de cada ciudad, &c.”

The counsel for the plaintiffs confidently assert that this law is clear and explicit in its terms and decisive of this controversy. The word *arenales* they contend means alluvion, and in this they are in some measure countenanced by what fell from this court *arguendo* in the case of Packwood vs. Walden, 7 Martin, N. S., 90. But does the word *arenales* necessarily mean alluvion? Certainly not, nor can I see any good reason for considering it as used in that sense in this law. None of the definitions of *arenal* to which our attention has been called in various dictionaries, conveys any such idea as alluvion, that is to say that portion of soil which is insensibly (*poco à poco* in the language of the Partidas) added to and becomes a part of land bordering upon a water course ; and the only comment of Gregorio Lopez upon the word is a quære, “ *quid de fluminibus?*” as if he considered the *arenales* “ *en las riberas do los rios,*” as forming a part of the bank itself of the river, and consequently its use already belonging to the public by a previous law of the Partidas and now given to towns in front of which they exist, and he suggests the enquiry whether the use of the rivers also be given to the city as well as the bank.

If it had been the intention of the law-giver to create an exception to the general rule, as recognized in the Partidas, that the alluvion belongs to the owner of the riparian estate or *heredad*, such an exception would naturally have found its place in immediate connexion with the general law. Again, why treat of the accessory, without any allusion to the principal?

I am rather inclined to think it means only the sandy beach common on shallow rivers, which are any thing rather than alluvion formations, and which the inhabitants of cities or towns are authorized to use in common for their domestic or perhaps agricultural purposes, or for public promenades, as the Arenal of Murcia on the river Segura; Mrs. Cushings Letters, vol. 2d, 342. Be that as it may, it appears to me clear, that all the objects enumerated in the law are connected together and are referred to by the words *establecidos y ortogados*; and if the threshing and grazing grounds and other conveniences mentioned in the law, rest upon a grant to the town, the *arenales* are in the same category, and according to my understanding of the law, it is only an enumeration of those things which are usually given or reserved by the sovereign for the use of towns or cities laid out by royal authority, or which they hold by usage or by concession. In that sense substantially, Gregorio Lopez appears to have understood it. “*Præterea quod hic dicitur (que son establecidos) non intelligitur, quod à jure sunt statuti pro civibus; quia civitati vel castro de jure nihil corporale est deputatum, quod sit de ejus pertinencia; nisi quatenus à lege aut consuetudine aut hominum dispositione riperiatur concessum.*”—Note 6.

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But the counsellor for the Municipality contends that the corporation is in a certain sense riparian proprietor, and therefore entitled to the increase by alluvion on the front. I cannot do justice to this part of the argument without quoting the language of the senior counsel, in which he develops his views on this point.

“To any person,” says the counsel, “who has studied the Civil Law of Louisiana and knows the source from whence this text is drawn (art. 501, La. Code) as well as the legal acceptance of the term ‘*fonds riverain*’ (riparious estate), this text is sufficient to form a decision on the conflicting claims of the city and private individuals—owners of lots which are only portions of the estate (*fonds*) upon which the city is founded (*fondée*). ”

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“ He will entertain no doubt that the city and not the owners of these lots is the riparian proprietor.”—Page 121.

“ To build a city,” continues the counsel, “ town or village, it is necessary, I conceive, to have first the ground (fonds). This (the fundus) being had, the town is built upon it. Thus built the town becomes inhabited, and the inhabitants, for the purpose of ingress and egress to and from their houses, &c., and for access to the river upon the borders of which it is situated, for returning therefrom, and for that of travelling over the whole front of the town, if their business requires it, have streets, roads, issues and avenues, which are no more than parts of the ground, foundation (fonds) upon which the town is seated.

“ What is the nature of this property (fonds) now? Is it not an urban property?

“ To whom does it belong? Necessarily to the community called a city; to that aggregation of persons who inhabit it. Each of them is proprietor of the lot on which his house is situated, and all possess in common the streets, roads, issues, and avenues, to the use of which every stranger, whose affairs lead him to the town, is in like manner entitled.”

He then supposes the prince or the individual who should have founded a city would no longer be regarded as proprietor, and could no longer sell the soil upon which the city is built than he could the inhabitants; that he no longer remains master of the ground (fonds) upon which the town is built.

“ We must therefore conclude,” says the counsel, “ that the ground (fonds) which was *rural* and by its conversion into a city has become *urban*, no longer does or can belong to its ancient master; that it is and can only be the property of the public—of that aggregation of inhabitants, who by the fact alone of the roads, streets, issues and avenues being destined to their common use form one community.”

It is not easy to conceive how the city in the case thus supposed, in its corporate capacity, becomes proprietor of the port in such a sense as to profit by the alluvion. Take the

square of the city, for example, which was laid out by the sovereign, the original plan exhibits a front row of houses—next, a vacant space marked *quai*, then the levee and the river. The front lots belong to individuals and are bounded in front by a *locus publicus*, the *quai*. In what sense is the corporation a front proprietor, even admitting that the owners of the lots fronting the *quai* are not so. I admit that if a batture should be formed in front of the square of the city, it would be an addition to a *locus publicus*, but that does not prove what is contended for, because the city is not proprietor of the *locus publicus*, but only administrator. It belongs as much to a citizen of Ohio as to a citizen of New Orleans. It is a place left open for the convenience of commerce, and for the use of the whole world—a *thing hors de commerce*.

But so far as the case supposed is meant to apply to the *locus in quo*, it assumes as true what is yet to be shown, to wit: that the lots in front are not bounded by the river, that they are not liable to abrasion by the river to the loss of the owners; and that the proprietors would not be bound to give a new levee or a new road, in the event of the existing one being carried away. These are questions which we are to examine in this case, and therefore we cannot begin by assuming that the corporation is the riparian proprietor. It is certain that the Jesuit's plantation was originally entitled to the alluvion, and I am now only arguing what change was produced by the mere incorporation of the city in 1805. The question of dedication yet remains to be investigated—for the present it is enough to say that in my opinion the change of the name of the property from rural to urban, by the mere act of incorporation, neither made the city a front proprietor in the sense contended for by the plaintiffs, so as to enable it to acquire *jure alluvionis*, nor did it *per se* deprive the front lots into which the property was subdivided (provided they fronted on the river,) of the right of such accretion.

The counsel for the plaintiffs endeavor to fortify the claim of the city to the alluvion by showing that the charge of keeping

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The Jesuits' plantation, out of which the *locus in quo* arises was originally entitled to the alluvion or batture in its front. The mere act of incorporation of the city in 1805 changing the name of this property from rural to urban, neither made the city a front proprietor, so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion.

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proprietors, and that, therefore, the former ought to enjoy all the advantages resulting from the situation of the land—upon the maxim, "*qui sentit onus, sentire debet et commodum.*"

That this axiom of equity lies at the foundation of the right of alluvion may be true—it is but just that the risk and loss re-

The onus or burden consequent on the right of alluvion is *natural*, not civil; it is a risk arising from the exposed position of the land, not the expense of making embankments; for the right of alluvion exists on streams which do not overflow.

sulting from the situation of the land should be compensated by the chances of increase by alluvion. But the *onus* or burden spoken of is natural not civil. It is a risk arising from the exposed situation of the land, not the expense or trouble of making embankments to save the land or adjacent tracts from inundation. The right of alluvion exists on streams which do not periodically overflow, as well as others which do, and those police regulations which relate to the making and keeping up of levees have nothing to do, in my opinion, with the question of alluvion.

The public, thro' the agency of the corporation, has the sole use of the levee and of the bank of the river; and the front proprietors cannot extend the levee without the consent of the corporation, which in the meantime has the right to make all improvements for rendering it useful to the public and favorable to commerce.

The arguments of the counsel drawn from the supposed inconvenience of having a port or any part of its bank owned by individuals, and the danger of the public being excluded from the use of it to the great detriment of commerce, would be entitled to serious consideration, if it were not true at the same time, that the public, through the agency of the corporation, has the sole use of the levee and of the bank of the river. That the front proprietors cannot extend the levee without the consent of the corporation, and that the city authorities have a right to make all improvements for rendering the whole most useful to the public and favorable to commerce. So far as it concerns the public convenience it seems to be of little importance whether the future increase of the batture shall be decided to belong to the public or to the front proprietors so long as the municipal authorities alone have the entire control of every thing on the outside of the levee and have a right to establish wharves and other conveniences which commerce may require. In most of the sea-ports of the Union it is believed the wharves are private property. Here they will be public, whoever may be considered the owner of the bank of the river, subject to the

public use. The Louisiana Code is explicit on this point: **EASTERN DIS.**
 “The use of the banks of navigable rivers or streams is pub- **April, 1841.**
 lic, &c., nevertheless the property of the river banks belongs **MUNICIPALITY**
 to those who possess the adjacent lands.” “On the borders of **NO. 2.**
 the Mississippi where there are levees, the levees shall form the **vs.**
 banks.”—Art., 446, 448. **ORLEANS**
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It is not pretended that the question which this part of the case presents, has ever been directly adjudicated upon by this court; but it is supposed by the plaintiff's counsel, as well as the parish judge, that the court has on more than one occasion given a strong intimation, that in their opinion, the alluvion formed since 1805, belonged to the city in virtue of the act of incorporation, and especially in the case of *Cochran vs. Fort et al.*, 7 Martin N. S. 622. In that case the plaintiff claimed a city lot fronting on the river, and the alluvion which had formed upon it since his purchase. The question presented was mainly one of fact, to wit, whether the batture in front of the lot was or was not at the date of the purchase susceptible of private ownership. If so, then it could not be presumed that the vendor of the plaintiff intended to sell it, and the only principle settled in that case was, that the sale of a lot, *front to the river*, according to a plan which shows the front line to be within the levee, does not carry with it alluvion, provided, at the time of the sale, a batture was formed of sufficient height and magnitude to be susceptible of private ownership. The converse of the proposition, it would seem, ought to be tried also, to wit, that the sale of a *city lot* fronting on the river, would carry the alluvion which had formed since the sale. The only difficulty in the case was to ascertain the mere matter of fact, to wit, did the batture in front exist or not at the time of the sale. The court decided in the affirmative, and consequently the plaintiff failed in his action. After deciding the matter of fact decisive of the case, to wit, that in February, 1803, a batture did exist which, with a five feet levee, might have been used as private property, the judge, who acted as the organ of the court, made the remark upon which so much

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stress has been laid, to wit, "supposing this view of the subject incorrect, and that we were to conclude with the plaintiffs that no batture susceptible of ownership existed in February, 1803, their case would not be much stronger. The faubourg was incorporated two years after. To enable them, therefore, to recover in this action, they must show a batture created between the day of their purchase and the date of the act of incorporation, which was susceptible of ownership; for if the alluvion was formed afterwards, it became the property of the city, and not of the front proprietors." Certainly, the decision of that case did not require such a remark. It was purely speculative, and although it may perhaps express the opinion of that able judge at the time, yet it does not appear to have been a point discussed during the argument, nor at all material in the case. The question now presents itself directly before us between the city and the owners of front lots in relation to alluvion, formed since the act of incorporation, and I am of opinion that the mere act of incorporation did not change the character of the property, and gives no new title to the city. On this point, I believe, we are unanimous.

The words used by me, as the organ of the court, in the case of the Municipality No. 1 vs. Municipality No. 2, 12 La. Rep. 49, have been also alluded to as indicating a strong opinion the other way. The expressions were, "The pretensions of the defendants as set up in their answer to *the exclusive ownership* of the property in question, and those of the plaintiffs, &c., to take one hundred thousand cubic yards of sand from the batture *ad libitum*, &c., are, in our opinion, equally unfounded and preposterous." In that case there was an express dedication to public uses of the alluvion in front of the suburb St. Mary by a formal contract between the city and the front proprietors, and the act of 1836 refers to and sanctions that compromise; and expressly provides that "the Municipality of the upper section of the city of New Orleans shall not in any manner obstruct or impede the inhabitants of any portion of the city, in the free use and enjoyment of any

of their rights on the batture." With such a legislative injunction, how could the Municipality with any propriety or consistency pretend to be the exclusive owners of a *locus publicus*, which it was their duty to administer according to its destination? But that case and the present have not the most remote analogy to each other.

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II. I now enter upon the second branch of this inquiry, to wit, whether the laying out of the Faubourg, as shown by the plans, and disposing of lots in conformity thereto, or any other acts of Madame Delord or her successors, taken in connexion with the various ordinances of the City Council, furnish sufficient legal evidence of an intention on her or their part to dedicate the property in question to public uses, so as to constitute a *locus publicus*. The petition alleges that, by reason of the incorporation with the said city, and the laying out and dividing the land, of which the Faubourg is composed, into town lots, streets, &c., as a part of said city, the title to all the said batture or alluvion, then so imperfectly formed or thereafter to be formed, *became by law vested* in the corporation of said city for public uses. It is not distinctly alleged, that there ever was a *dedication* to public uses in a legal sense of the word, resting essentially upon the express will of the *dedicator*, and assented to by the public, evidenced by the public use of it, according to the dedication. But the idea is, if I understand it, that the annexation to the city successively of the different faubourgs, formed but a continuation of the square of the city, and imprinted upon the land in front of the street or road nearest the levee, the same character which the corresponding part of the squares of the city possesses, that of a *quai*. This system is developed with ingenuity and learning in a pamphlet which has been furnished us as a part of the argument in the case, but the author's name is unknown to us. He considers the *quai*, marked upon the original plan of the city, as *belonging* to the city, and not as a *locus publicus*. It is of no consequence in the present case, whether the original *quai*, as designated on the plan made by the French authorities of Louisiana, be

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regarded in that light as granted to the city, or as a public place. The question is, admitting the old city to be, in that sense of the word, the riparian proprietor, and entitled to any alluvion which might be formed in front of it, whether it results from the plans of the different faubourgs, that all the land between the front row of houses and the levee partook of the same character with that in front of the old city, and that the city was, as relates to the land in front of the faubourgs, also entitled to the alluvial increase,—or in other words, that there was a continuation of the *quai* through the different incorporated faubourgs. The author, above alluded to, treats the old city as the nucleus, around which the faubourgs have gradually clustered, and stand in relation to it as children towards a parent, or perhaps more properly, as partners and associates.

It seems to me clear, that the right to alluvion in front of each faubourg must stand upon its own peculiar grounds, that there is not necessarily any connexion between them. The square of the city was laid out and founded by the Sovereign. The faubourgs were laid out by the proprietors of different estates in the vicinity, each having a right to alluvion, and the question, what was the condition of the front afterwards, would depend not upon a general conformity of the streets and avenues to those of the square of the city, but upon the disposition made of it by the former proprietor. The French authorities of Louisiana indicated an intention to devote to public uses, to consecrate as a *locus publicus* all the vacant space between the first row of houses and the river, by writing the word *quai* upon various parts of the plan, and by leaving it open for public use. If, in laying out the faubourgs, the ancient proprietors of those riparian estates did the same thing or what was equivalent, then there is no doubt it amounted to a dedication, if accepted by the public. The present enquiry is confined to the faubourg Delord, and to the plan of it made by Madame Delord; for with respect to the faubourg St. Mary, it was long since settled, that the alluvion belonged to the front proprietors, and it has subsequently been dedicated to public uses by a compromise between them and the city.

The French government in laying out the ancient city of N. Orleans, left an open space between the front row of houses and the river, marked *quai* on the plan, which was a dedication of this space to public use, and it became thereby a *locus publicus*.

If in laying out the faubourgs, the ancient proprietors of those riparian estates, had left an open space between the front street and the river, marking it as a public place on the plan, it would have amounted to a dedication, if accepted by the public.

It may not be amiss, however, to refer to what the court said in the case of Morgan vs. Livingston, with respect to the effect of the plan of a faubourg made by Gravier, and the condition of the property after its division into lots. "On the morning of the day," says the court, "on which Bertrand Gravier sent for a surveyor, to make a plan of his plantation into lots and streets, the land covered by it was rural property, burdened with *riparious duties* in his hands, and when the plan was finished by the division into lots and streets, *no alteration was wrought* in these burdens. When nine months after Poeyfarre purchased the trapezium, he purchased a rural estate, burdened with riparious duties, having the portion of the bank of the river before it as an accessory. The sale discharged the vendor from and imposed on the vendee, the duties of repairing the road and levee along the land conveyed. If any part of this portion of the road had been found out of repair, the syndic of the district would have compelled the vendee to repair it without the least inquiry into the circumstance, whether his deed bounded him on the road or on the river, if he was really the owner of the land, and separated from the river by the road only. The banks of the river, opposite to the trapezium, passing to the vendee *cum onere*, must have passed *cum commodo*. "Had every lot in the faubourg been sold, the liability of the land which they covered, would have continued the same," &c.

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The "member of the Louisiana Bar" whose argument has been mentioned, undertakes to maintain two propositions. First, that the city of New-Orleans acquired, at the time of the union of the suburb Delord with the city, all the riparious rights which Madame Delord possessed by virtue of a valid contract, and for a valuable consideration. And secondly, that Madame Delord has never disposed of any portion of her riparious rights in favor of the defendants. The record does not furnish us with any evidence of any such *express* contract, as is supposed. In 1805, the plantation which afterwards became the faubourg Delord, formed an integral part of the city by the act of incorporation. After it was laid out as a faubourg,

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it remained for many years what was termed one of the *unincorporated* boroughs or suburbs of the city, that is to say, not yet entitled to participate with the square of the city in the advantage of being lighted and guarded at the common expense. This last step was not taken until 1831, when by an ordinance of the City Council, a part of the faubourgs Delord, Soulet and Lacourse, between the upper line of the faubourg St. Mary and the centre of Lacourse street, was *incorporated*, and required to pay the same taxes, and authorised to enjoy the same rights and privileges as the inhabitants of the square of the city. Ordinance of April 8, 1831, City Laws, 63. Up to that period I have seen no sanction by the city authorities of the plan of a faubourg adopted by Madame Delord, much less any contract by which she abandoned the front of her land to the city. Indeed, the uniform legislation of the City Council from that time until the inception of this suit, repels such an idea. In 1817, an ordinance was passed concerning the unincorporated boroughs and suburbs within the city of New-Orleans, which provided among other things, that "the levees adjoining the estates bordering on the river, situate in front of unincorporated boroughs or suburbs, which have hitherto been kept in repair at the charge of the proprietors, whose lands are bounded by the river, whether by a particular clause stipulated between the vendor and the purchaser, or of an obligation anterior to the settlement of said boroughs or suburbs, shall continue to be kept in repair at the expense of the said proprietors, in the manner prescribed by the ordinance concerning highways, bridges and levees within the liberties of New-Orleans." The ordinance last referred to was passed in 1815, and requires the front proprietors to keep up the levee. The ordinance of 1830, the execution of which led to the suit between the city and Henderson and others, treated those who held lots under Madame Delord as front proprietors. It directed a new levee to be laid off by the city surveyor, commencing at the lower line of the faubourg Delord, and running parallel with New Levee street to Roffignac street, and then to the upper line of Mr.

Byrne's property. It directs the proprietors to be notified and requires them to complete and deliver said levee on the first day of November, and it was made the duty of the mayor to notify the front proprietors of lots in the faubourgs Delord and Saulet, and it further directs the work to be done at their expense in case of contravention, besides a penalty of one hundred dollars. A new road and levee were directed to be laid off in advance of the former ones, and the questions which arose in the case of Henderson et al. vs. the Mayor, Aldermen and Inhabitants, presupposed the plaintiffs to be in point of fact riparian proprietors, for they related to the obligation of the latter to furnish a new road, and to make and keep up the new levee.

But if on the part of the city authorities every official act which has been brought to our notice, tends to show that the city did not understand there was a dedication, resulting from Madame Delord's plan of a faubourg, which constituted the city the riparian owner, as is now pretended, how do the subsequent acts of Madame Delord and her successors accord with the theory of a dedication to public use? On the 26th of May, 1806, she sells to Larche three lots on the batture, according to the plan of Lafon, of the 21st March of the same year, the purchaser taking upon himself the burden of making and keeping in repair the road and levee in front of said lots. On the 6th of June, 1807, she sells to Armand Duplantier her plantation of about seven arpents, fronting partly on the river and partly on the great route of Tchapitoulas, and among other title papers handed over, appears a plan of the plantation by Lafon, of the 6th February, 1806. None of the plans in the record contains any indication of the front having been dedicated to public use, and her contract with Larche and with Duplantier shows that she did not so understand it. She continued to exercise acts of ownership as a riparian proprietor not only without opposition on the part of the city, but the last ordinance of 1830 by the city authorities, acting as a police jury, and laying out a new road and levee, imposes upon her successors,

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But none of the plans show any indication of Madame Delord and her vendees having ever dedicated the front of her property on the river to public use: on the contrary she continued to exercise acts of ownership as a riparian proprietor, and was required by the city ordinance of 1830 to keep up the levee in front as such.

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Lafon's plan of the 6th of February, 1806, is now before me. It exhibits the side lines of the plantation of Madame Delord, which separates it below from the faubourg St. Mary, and above from that of Soulet, as running diagonally down to the water's edge. The front lots are represented as bounded on New Levee street, and the levee is marked along the side of the street and between it and the river, at a distance of about fifteen toises from it. There is no mark indicating any intention on the part of Madame Delord, to give up her claim or title to the land forming the levee and on the outside of it. Since the date of that plan, the land upon which the cotton press stands, has been formed, and the levee and public road, laid out by order of the City Council in 1831, are about two hundred feet outside of New Levee street; and all the land between New Levee street and the new road and levee belongs, according to the judgment rendered in this case, to the front proprietors. The intervention of a public road between the front tract and the river does not prevent accretion by alluvion, because the road and the levee themselves belong to the front proprietors, subject to the public use.—6 Martin Rep. 230; Sirey for 1822, part 2d, page 191.

It is true the public has always possessed and used the levee and the ground between it and the water's edge; and if the city authorities, under whose administration such a right has been enjoyed, had no other title but that which would result from the presumed consent of the front proprietors, such enjoyment in the presence of the latter might tend to show an acceptance on the part of the public of a dedication to public uses. But the law itself gives to the public a right to such enjoyment independently of the consent of the front proprietor, and such use is not legally inconsistent with the ownership by the riparian proprietor. Nothing therefore can be inferred from the public use of the bank of the river and the land on the outside of the levee, and the batture as fast as it forms. The city authorities have the exclusive control of the levee and

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The principles which govern in cases of dedication to public uses are considered as well settled. They were recognized by the Supreme Court of the United States in the case of the city of Cincinnati vs. White's Lessee, 6 Peters' Rep., and were assumed by the present senior judge of this court as the basis of his opinion in the case of De Armas et al. vs. the city of New Orleans; 5 La. Rep., 148. "The law applies to it" (a dedication) says the court, "those rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication. That there was no particular form or ceremony necessary in the dedication of land to public uses and that all that was required was the assent of the owner of the land, and the fact of its being used for the public purposes intended by the dedication." Tested by these principles I cannot find, in the case now before us, any evidence of an intention on the part of Madame Delord or her successors to dedicate the front of her or their land to the public use.

But the principle that the intervention of a public road does not cut off the right of alluvion, or in other words, that a tract of land separated from the river by a public road is still considered as fronting on the river, and a riparian estate has been contested in this case on the ground that the land over which the road runs was paid for by the city in pursuance of the judgment of this court in the case of Henderson et al. vs. the City, and that consequently the city became the absolute proprietor of the road and levee, and front owner. Even supposing this to be true, which I am not disposed to admit, and that the road opened under the ordinance of 1831, became by the judgment of the court the absolute and irrevocable property of the city, still it is nothing more than a public road, *via publica*. This court in the case of Morgan vs. Livingston decided in the most explicit manner this question. The language of the court in that case leaves no doubt upon that point, sup-

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ported as the principle is by unquestionable authority. The very point now urged was considered and overruled. The court says :

“ The bank passes with the field *even when there is an intervening public road*. Ripa cedit fundo, l. Riparum, ff. rer. divis. Inst. eod. tit.—Dicit verum si via est media. Ripæ, respectu proprietatis sunt illorum, quorum prædiis hærent, sed quid si via esset in medio, interflumen et agrum vel domum? Responde idem ut Ripæ sunt eorum. Cæpola, &c.

“ If there be a public road between a field and the river, still that which is made by alluvion accrues to the field. Si meum inter agrum et fluvium interjaceat publica via tamen meum fieri quod alluvio adjicit. Grotius &c. Gronovii, nota 68.

“ But the defendant’s counsel urges that this must be understood of a private road—one of which the *soil belongs to the owner of the field* and is burdened with a right of way, and he refers us to the law, Atticus, ff. 41, l. 38, and to Grotius, who holds there is no principle of natural law which justifies the position that the owners of estates, separated by a public road from the river, have a right to alluvion, and admits that the field has the alluvion, if it be a private one, which owes a road—qui viam debeat; Grotius, &c. &c.,—so that the soil of the road be the property of the riparious owner.

“ The expression used by the writers whom Grotius condemns, is *via publica*, a public road.

“ A public road is that of which *even the soil is public*; it is not in a public road as in a private road, the soil of which does not belong to the public, while we have only the right of walking and driving over it; the soil of a public road is public. Viam publicam eam dicimus cujus etiam solum publicum est, non sicuti in privatæ via ita esse in publica accipimus; viæ privatæ solum alienum est. Jus tantum eundi et agendi nobis competit; viæ autem publicæ, *solum publicum est*.—ff. 43, 8, 2, sec. 21.

“ We conclude that in the present case the intervention of the public road between the trapezium and the river, cannot be

considered as a proof of the intention of the parties to give the land conveyed another boundary than the river.”

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I have copied this part of the opinion of the court in the case of Morgan vs. Livingston, not only because it is the language of the court, expressing its deliberate judgment upon a leading point in the case, which point is again made in the case now before us, but because it was written by the present senior judge, then the organ of the court, in pronouncing its decision.

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There is a striking resemblance between this case and that above alluded to, decided by the Cour Royale of Lyon and reported in Sirey for 1829, 2d part. In that case the Commune of Roques insisted that the property of the defendants was separated from the Garonne by a public road (*chemin communal*) and consequently the alluvial increase could not attach to it, although it might be otherwise if separated only by the tow-path (*chemin de halage*) because the latter is but a servitude imposed upon the riparian property. But the court held otherwise, and relying upon the same authorities from the Roman Digest and Institutes which are quoted in the case of Morgan vs. Livingston, decided that a public road does not legally interrupt the adhesion between the front lands and the river, which it separates, because the road makes a part of the land itself, if not *quoad proprietatem*, at least *quoad commodum et incommodum*.

This argument is based upon the supposition that the new road in front of the Cotton Press, laid out under the ordinance of 1831, belongs to the Municipality in full property, or is a public road, and has been purchased from the front proprietors in pursuance of the judgment in the case of Henderson et al. vs. the City. But there is no evidence in the record that such is the case. That judgment proceeds upon the ground that the land over which the new road was laid out belonged to the front proprietors. The city was enjoined from proceeding to open the road without paying an indemnity to the front proprietors, and the injunction was maintained by the final judgment until the city should pay that indemnity. Nothing fur-

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ther appears to have been done. No expropriation has ever taken place, either according to the mode pointed out by the Code, or to the act of 1832 relative to the opening of streets. The judgment of the District Court, which was affirmed, was "that the injunction be continued in force as relates to the making of the road until the defendants shall indemnify the plaintiffs for the damages which the establishment of said road may cause them respectively," &c. The court decided little more than the abstract question of right, to wit: that the front proprietors, or those under whom they hold, having already given one road, according to the condition, express or implied, of the original grant, were not bound to furnish another without indemnity. Surely that judgment did not *per se* divest them of their title to the land over which the road passes. Until the amount of indemnity shall have been assessed, there is no price of the thing to be forcibly sold, and the act of 1832 makes the payment of the indemnity or tender and refusal a condition precedent to the divesting of the title. Until then the title of the ancient proprietor is unimpaired.

To conclude: Upon a view of the whole matter which this case presents, I am of opinion that the act of incorporation of 1805 did not and could not legally affect the right to alluvion, which belonged to the original tract of land, that afterwards composed the faubourgs Saulet and Delord.

That each part of it fronting on the river was still entitled to the right of accretion notwithstanding the act of incorporation.

That the laying out of the faubourg in 1806, according to the plan in the record, viewed in connexion with other acts of Madame Delord and of the City Council, do not furnish legal evidence of a dedication to public uses, and that the purchasers of front lots still remained riparious owners.

That urban property fronting on a water course is entitled to alluvion as well as rural estates; and that cities can acquire *jure alluvionis* only in virtue of a title which would constitute them front proprietors.

That the defendants must be considered as owning down to the road, last laid out, and that the intervention of the road does not in law prevent them being regarded as front proprietors, and entitled to any alluvion which now exists or may hereafter be formed between the levee and the water, subject to the public use under the administration of the municipal authorities.

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A majority of the court concurring in these views, it is ordered, adjudged and decreed, that the judgment of the Parish court be annulled, avoided and reversed, and that ours be for the defendants, with costs in both courts ; reserving, however, to the public the use of the levee, and of all the alluvion which existed at the inception of this suit, or which now exists, or may hereafter be formed between the levee and the river, to be administered exclusively, and its use regulated, according to law, by the City Council of the Second Municipality.

Morphy, J.—The opinion just delivered by judge Bullard, sets forth so fully and satisfactorily the views of the majority of this court, on the several questions submitted in argument, that I cannot believe it necessary for me to do more than express my entire concurrence in them.

Simon, J.—I have carefully considered the opinion which judge Bullard has prepared ; it expresses so fully my ideas upon the important questions which this case presents, that I deem it sufficient to state, that the conclusion to which he has arrived, appears to me correct on all the grounds therein assumed ; and that I perfectly concur with him in the opinion and judgment which he has just pronounced.

Garland, J.—Concurring generally in the reasoning of the learned judge who has delivered the opinion of the court, and fully in the judgment, I will give a few of the reasons upon which my judgment is based.

It is the unanimous opinion of the court, as I have always understood, that previous to the act of the 17th of February,

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1805, incorporating the city of New-Orleans, the plantation of Madame Delord was a riparian estate, and entitled to the alluvion in front of it. It is also agreed, that that act of the Legislature did not, in any manner, affect her title to the property, or interfere with her right to enjoy it. If, therefore any change has taken place in the title or right of enjoyment, either by her or those who hold under her, it must be in consequence of some act of her or them. What is the act that changes the tenure by which the property is held, or deprives them of that provision of the constitution which says, "nor shall private property be taken for public use, without just compensation."

In February, 1806, Madame Delord laid out a portion of her plantation into lots, extending the streets that previously existed in the Faubourg St. Mary running parallel with the river and giving them the same names, and laying out new streets at right angles (or nearly so) with them, giving them new names. Tchapitoulas street was then the public road alongside the levee, which was a servitude on the land, and she, in laying out the lots, left it as a street, and between it and the edge of the water on the batture, laid out a range of squares, subdivided into lots, having New Levee street in front, between which and the water's edge, there was left an open space, extending along the whole front, on which not a word was written nor is anything said about the use of it, nor to whom it belongs. In the rear of the lots a large space is left in the same manner. The strip in front, which has been much increased by alluvion, is the subject of controversy. Now did the mere act of laying off the land into lots change her title or right of enjoying it in the mode prescribed by law? I suppose, it did not of itself, because if she had the next month destroyed her plan, and again planted cotton or cane on the land, she could have done so, and no one would have any claim to the lots or the streets, or any right to disturb her in the enjoyment of the whole property. Then what deprived her of her right to close up the streets, and deprive the public of the use of them? It was, in my opinion, because she sold the

lots, and held out to the purchasers by the plan a right of way, specially mentioned, which they and their successors have a right to use as long as they are proprietors of the property.

What the presiding judge of this court said in the case of *Morgan vs. Livingston*, 6 Martin 236, in relation to Bertrand Gravier, his plan and its effects, has been repeated verbatim in the opinion just read.

If that be true, as to Bertrand Gravier and Poeyfarré, and those holding under them, why is it not so in relation to Madame Delord, Larchevêque and Duplantier, and those holding under them? The sale from Madame Delord to Larchevêque is so nearly similar to that of Gravier to Poeyfarré, as to approach identity. A perusal of the whole of this case, will show that the majority of the court are not about to depart as far from the principles, upon which it was decided, as some of those who aided in establishing them.

I am not one of those who hold, that the right of alluvion is based exclusively on the principle of being subject to the expense and burden of keeping up roads and levees. The Roman jurists say, it is a mode of acquiring property by natural law, and comes from the maxim, it is "just, the advantages of a thing should belong to him, who supports its disadvantages." Therefore says a French writer, "nothing is more just than that a proprietor, to whom a stream has often borne prejudice, should have, to the exclusion of all others, when it becomes beneficent, a gift, less a present than an exchange." 4 *Nouv. diction. de Brillou*, 278. The learned chief of this court has said, "the right of increase by alluvion is grounded on the maxim of law, which bestows the profit and advantages of a thing upon him who is exposed to suffer its damages and losses." 6 Martin, 243. Roads and levees have nothing to do with the right to alluvion; it is the liability to lose a portion of the land by the abrasion of the waters, that gives the benefit, and a man is as much entitled to the alluvion formed in a river, on the banks of which there is

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neither road nor levee, as he, who is on a river that has both.

A good deal has been said in argument about urban and rural property. If by this, it is meant that there is a difference between the tenure, by which property is held in a city, from that in the country, I have not been able to see it. I understand something about urban and rural servitudes and uses; but they differ essentially from the titles by which property is held, and I know of no law by which these accessories or burdens can *ipso facto* deprive a person of title.

The plan of Mme. Delord, leaving an open space between N. Levee street and the river, was not a dedication of this space to public use. There was nothing marked or written on it indicating an intention so to dedicate it.

But it is said that Madame Delord when she left the strip of batture in front of her lots, intended to give it to the public, and that, although she said not a word about it on her plan, yet it is dedicated to public uses. This is a matter of fact, and let us examine it. She does not say, either verbally or in writing, it was her intention to give it. She certainly knew she had a right to the batture in front of her property, as a number of squares were laid out on it, and the levee was not made in front of them until sometime after, when it was made at the expense of the front proprietors. Can any one believe, it was her intention to give this batture to the public, when she was daily selling it. In less than ninety days after she made her plan, she sold lots on the batture to Saulet and Larche; in these sales she specifies, they are to keep up the road and levee, and she abandons to each of them all her pretensions to the river, (*elle se desiste de toutes pretentions sur le fleuve*). In the sale to Duplantier she is very explicit. The sale is for seven arpents, "*face au fleuve, et l'autre partie à la grande route des Tchoupitoulas,*" together with "*tous les droits de propriété qu'elle a et pour avoir sur la dite habitation.*" I think, my learned colleague will admit, that when a person has a property that will sell readily at good prices, and is actually selling, it is not a strong presumption of an intention to make a donation to the public.

But it is said, the plan is a sufficient dedication, and the plan of the square of the city is constantly referred to, as if it was similar. If the words, *quay, port, public square,*

or any thing indicative of an intention to give, were on the plan, and the public had used the ground, I should say, it was a sufficient dedication; but there is nothing of the kind shown. The case of the city of Cincinnati vs. the lessee of White, 6 Peters, 432, is much relied on, and is said to sustain this dedication. That case is not, in my opinion, understood either as to the facts or the real points decided. It does not appear positively, what words were used to prove a dedication. My colleague says, *none*; I think differently. The court says, "a plan was made and approved of by all the proprietors; and, according to it, the ground lying between Front street and the river, *was set apart as a common*, for the use and benefit of the town forever; reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common." The language used by the court proves something was written on the plan, otherwise how could the right to a ferry landing have been reserved. On page 440 the court again says, "in the present case there having been an *actual dedication fully proved*, a continued assent will be presumed, until a dissent is shown." Full proof, I think, means something more than a blank space on the plan. But the real questions in the case were not, whether the plan did not exhibit a dedication, but whether it must not be proved by a deed in the same form, as was necessary to convey title; and also, if there had been a deed, if the grant was not void, the proprietors not having the legal, but only equitable title to the land; and there being no grantee in existence to accept it, the city not being incorporated when it was laid out. The court held neither a deed nor a grantee was necessary, and said, "no particular form or ceremony is necessary in the dedication of land to public use. All that is required, is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation." I agree most cordially to all this, and if the assent of Madame Delord or those holding under her, was shown, I should conform my judgment to it.

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There is no particular form, necessary to a dedication of land to public use.—But it requires the assent of the owner and the fact of its being used for the purposes intended.

It is said this assent has been shown by the notorious public

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use of the ground for thirty-five years. Where the evidence of the notorious use for that space of time is to be found I am unable to discover. It is certainly not in the record. For some time after the lots were laid off it is not probable much business was transacted in that quarter; the levee was used there, it is to be supposed, as at other places near the city. More recently, the evidence shows the city did not keep up the road or levee but compelled the front proprietors to do it. The people there were not considered in the incorporated limits of the city until 1831. The record is full of evidence showing that the levee and batture were appropriated to private purposes, covered with saw mills, wood yards, sheds to make shingles under, and shops of various descriptions. Pilié, a witness, says he never saw a place so incumbered, he had great difficulty in passing along, and so indefensible did the corporation in 1830 regard their pretensions or so powerless was it to enforce them, that the Legislature had to pass a law to enable the Mayor to remove the obstructions. The execution of this law gave rise to the suit of Henderson and others *vs.* the Mayor, &c., 3 La. Rep., 563; 5 *idem*, 416; on the second trial of which case, the corporation admitted in the record, that the plaintiffs were the owners and proprietors of the lots and of the batture also.

The admissions made by the attorney of the corporation in that case, it is now said, are not binding, as he had no right to make them. His want of authority has not been shown to my satisfaction, and I know no reason why the regularly appointed attorney of a corporation cannot make admissions as well as the attorneys of individuals, and why they should not be as binding on the principal. Corporations have no higher privileges or rights than citizens unless specially granted, and are especially bound by the acts of their agents, as they cannot be bound in any other manner. It is to me rather a curious doctrine that the corporation can constitute itself the champion of the public, to vindicate or assert its rights, and its acts can the next moment be repudiated. If the admissions made were

null, why were they not so declared at the time. We are informed the decision of the case was based on them, if so they were valid, and being valid then, are equally so now, unless shown to have been made in error or fraud. I do not recognize the existence of a tyrant public which no law can bind, that can assert a right to the property of a citizen and deprive him of it by its *ipse dixit* at pleasure, under the plea of necessity or the public good. The doctrine bears the impress of another sphere and has its origin in imperial Rome, or in the benighted days of France and Spain. But if the public is so far above all law, it does not prove its agents and champions are so ; and corporations cannot by assuming or usurping the exercise of the powers of the sovereign relieve themselves from their proper responsibility. They cannot, under the pretext that their creator has been slumbering for years, suddenly arouse him and make him rudely seize upon the property of the citizen in his first waking moments. I concede that if it were shown the admissions were made in gross error and fraud, they would be void ; but there must be some stronger evidence of this, than the mere fact that they are prejudicial to the claims of the plaintiff.

It is not denied that if a tract of land owes a road to the public ; being one of the servitudes imposed by the grantor, that the alluvion belongs to the proprietor, but, it is said, if the proprietor of his own accord give a road, or one is taken from him by expropriation, under the acts of the Legislature of 1818 relative to roads, and that of 1832 relative to streets in the city, that then he is not entitled to the alluvion that may be formed on the other side of the road. I have sought in vain for any good reason for this distinction. No man is presumed to give without compensation, and when for public purposes private property is appropriated, no more is taken than is necessary for the purpose intended and stated. I should rather hear a good common sense reason given for such a distinction, than the citation of a disputable case from a foreign tribunal.

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It is further contended that the place in front of this property is a part of the port of the city, and being so, the whole bank of the river is public property. To this it may be replied, it was not a part of the port in 1806, nor was it so until a number of years after, any more than the river is a port at other places. Port, with us, has a definite meaning, and that of New Orleans specific boundaries, and it was not until 1821 that the Legislature extended it to the place in controversy. Afterwards Congress extended it to the limits of the three Municipalities; 2 Moreau's Dig., 259; 9 Laws U. S., 593. I am not aware of the law which says, when the Legislature extends the port of a city, that the citizens thereby are deprived of their rights to their property.

I have no apprehension that the city will be cut off from the river by an increase of the batture, and if there is one mode more effective than another by which such an apprehension is to be realized, it is by placing, *hors du commerce*, a large space in its front which could not be disposed of, except by the Legislature or Congress.

The Code specifies the rights, privileges and uses to which the public are entitled upon the shores and banks of rivers, and in the ports and harbors, and I am disposed to give full effect to them. As long as the public has need of the use of the bank of the river, the levee and batture in front of it for the convenience of the citizens and for commercial purposes, I think it is entitled to such use, and the Municipality the right to the administration; the soil remaining in the proprietors and owners of the front lots. Whenever the space shall become so large as not to be wanting for public use, the law provides a mode for extending the levee, and putting the owners in possession; La. Code, arts.

I therefore am of opinion that the judgment of the Parish Court should be reversed, so far as stated in the judgment, ordered to be recorded, and the rights of the parties must be regulated by it.

Martin, J., dissenting.—The plaintiffs claim *for the public use and benefit* a square of ground between Front and New Levee streets, in front of the faubourgs Delord and Saulet, which they allege to be a *locus publicus*, and to have been illegally occupied by the defendants. They claim also as a *locus publicus* the batture formed or to be formed before said Front street, which they allege, the defendants claim and partly occupy without title, and they pray that the defendants may be enjoined from any use, occupation or possession thereof.

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As to that part of the petition which relates to the square of ground, the defendants pleaded, as *res judicata*, a judgment of this court in the case of Henderson et al. vs. the Mayor of New-Orleans et al.; 3 La. Reports, 563. Being vendees of the plaintiffs in that suit, they deny the present plaintiffs' title to any part of the premises. They aver that they are *riparian* proprietors, and as such, entitled to any batture formed or to be formed in front of their property. They set up title in themselves, through several *mesne* conveyances from the original grantee of the king of France, and allege that their rights, or those of the persons under whom they claim, have been frequently recognized by the Mayor and Aldermen of the City of New-Orleans, and by the plaintiffs, by putting them into possession of sundry portions of the batture successively formed in front of their property and attached thereto, since the act of incorporation of the city; by charging these respondents with all the burdens and duties of riparian proprietors, and by doing various other acts and things by which the right, title and ownership of the defendants in and to the property and rights in controversy were distinctly recognised. They also pleaded prescription.

The exception of *res judicata* was sustained so far as it relates to the square of ground, but overruled in regard to the batture formed or to be formed outside thereof. There was judgment in favor of the plaintiffs, for the alluvion formed or to be formed along the levee, opposite to the square of ground, &c., &c.

The plaintiffs have not appealed, but have prayed that the

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judgment sustaining the plea of *res judicata*, so far as it regards the square of ground, be amended in their favor, and on this part of the case, I have come to the same conclusion as the other members of this court.

The facts of the case are these. In the early part of the last century, the city of New-Orleans was founded by the then king's grantee of the colony of Louisiana, viz.: the West India Company, according to a plan which has been printed in the corner of the large plan or map of the city of New-Orleans, published by Francis B. Ogden, in the year 1829. Soon after, a tract of land immediately above the city and extending 32 arpents in front along the Mississippi, was granted by the Company to Bienville, who sold it to the Jesuits, and the latter owned it until the dissolution of their order in 1763, when it was confiscated, divided into smaller tracts and sold. Gravier, Delord, and Saulet, by several *mesne conveyances*, became the proprietors of these tracts or a part of them. In the year 1768, the tract contiguous to the city was laid out into a *faubourg* by Gravier. The assent of government to the erection results from an order which the Baron de Carondelet, Governor of the Province, afterwards gave to Gravier, to deposit the plan of his *faubourg* in the archives of the *Cabildo*, and by the subsequent appointment of *Alcaldes de Barrios*, *Syndics* and inferior public officers, and the extension of the city government over the *faubourg*. In the year 1805, the city of New-Orleans was incorporated by an act of the Legislative Council of the Territory of Orleans, and its limits extended to a considerable distance upwards, covering the tracts purchased by Gravier, Delord and Saulet. In February, 1806, Madame Delord erected her plantation into a *faubourg*, and it is expressly stated on the face of her plan, that it is intended as an extension and continuation of Gravier's *faubourg* or of the city of New-Orleans.

Saulet soon after followed the example of Madame Delord, and the plan of his *faubourg* expressly states its being made in extension and continuation of her *faubourg*.

There appears on Madame Delord's plan, outside of the

levee, a trapezium of land, which, on the 28th day of May, in the same year, she sold to Larchevêque or Larche, as follows:

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“Trois terrains, situés *sur la batture*, en face de son habitation, bornés d'un côté par le Sieur Bellechasse, et de l'autre par le Sieur Saulet, conformément au plan, fait par Mr. Barthélemy Lafon, en date du vingt Mars dernier, étant à la charge de faire et réparer le chemin et levée en face du dit terrain.”

This trapezium was afterwards much enlarged by alluvion, and the latter, by several mesne conveyances, became the property of the defendants, and included the locus in quo, which is the subject of the present suit. It is, therefore, proper to give an accurate description of it, in doing which it becomes necessary to notice the adjoining grounds.

The line between the plantations of Saulet and Delord ran very obliquely from the river; the old levee ran along the king's highway or Tchapitoulas street. Previous to 1806, Madame Delord had constructed a new levee, about one square or three hundred feet from the old levee, thus taking in a portion of the batture; the precise date when this was done, is not ascertained, but it appears to have been before her plantation was converted into a faubourg. Inside of the new levee, Madame Delord had laid out a street which was called New Levee street; the new levee and the street did not run *direct* as far as the line of Saulet, but at some distance, say three or four hundred feet, if we may judge from the plan and scale, made an insett or turn *from* the river, and ran towards the old levee and king's road, until it intersected the aforesaid oblique line. There was thus left a triangular trapezium or irregular piece of ground, lying between the oblique line of Saulet and the insett of the new levee. New Levee street stopped at Roffignac street, and persons who were proceeding out of the city, along the former, were thus compelled to go into the king's road at Roffignac street. The shape of this piece of ground was such that it ran to a point formed by the

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oblique line of Saulet and the insett of the new levee, and towards the river the lines diverged. A strip of this trapezium, 34 feet front and running along the insett of the levee, is marked with the name of "Solet;" the remainder of the trapezium was the land sold to Larche.

In the act of sale from Delord to Larche as quoted above, the following charge or obligation was also added, to wit, the levee was to be at the charge of Larche.

"Etant à la charge de faire et réparer le chemin et levée *en face* du dit terrain."

From this description and contract it appears: First, that the trapezium was outside of the levee, and if the levee is to be considered as the bank of the river, then the trapezium was a part of the bank of the river.

Second, that the obligation on the part of Larche to maintain the levee, was not intended to apply to the old levee, but was imposed on the presumption, that the new levee was to be continued on a straight line, to join the line of Saulet, and thus constitute a protection against inundation to the land sold to Larche. This view of the matter is also corroborated by the words in which Larche is charged with the burden of the levee, which is to be "*en face*;" and it was the charge to keep up this new levee which was thus intended to be imposed on him. We presume that the new levee and street *were* afterwards continued in a straight line, and the land thus purchased by Larche from Delord, *was* thus protected by the new levee, and made to fall within it.

In 1830, the City Council ordered a levee to be made in front of the faubourgs Delord and Saulet. The surveyor, in executing this duty, found the ground encumbered by wharves, sheds, &c., and by steam saw mills, erected by the then claimants, under whom the defendants hold. The Mayor ordered them to be removed, and an injunction obtained to prevent this was dissolved by the district court, and on appeal this judgment was affirmed, on the ground that all the land outside the levee

was bank of the river, and could not be encumbered in any manner whatsoever. See 3d La. Rep. 568.

In that case the counsel for the city made the following admission. "It is admitted, that the plaintiffs are the proprietors of the different lots of ground as stated in their petition, and as such entitled to the increase of the batture in front of the same." 5 La. Reports, 419. And the court was induced to act upon this admission, which led to the decision in that suit, in which it recognized the right of the city, to have a new levee and road made in front of the locus in quo, on paying the defendants for the ground taken for the road.

In 1815 an ordinance was passed by the City Council, requiring the front proprietors in the unincorporated suburbs to keep up the levee, &c. &c.

In 1817 another was passed, directing that the levees joining the estates bordering on the river and situated in front of the unincorporated suburbs should continue to be kept in repair at the expense of the proprietors, as provided for by the act of 1815.

In 1831 the unincorporated Faubourgs Delord, Saulet and Lacourse were incorporated and required to pay taxes, and authorized to enjoy the same rights and privileges as the inhabitants of the original city, etc.

We have been favored with elaborate arguments and numerous and voluminous briefs. I have not felt it my duty nor my inclination, and I have doubted my ability to examine the classical disquisition which has been given us, on the words *Ager*, *Fundus*, *Prædium* and *Civitas* in the Roman law, and I coincide with the able view of that subject which the second judge of this court has presented to the profession. I have also thought fit to escape from a discussion of what is called the law of *Arenales*, and of the difference, if any exists, between the rights of rural and urban estates, in regard to alluvion. Assuming that on the extension and continuation of the city over a contiguous estate, with the authority of the State and the consent of the owner, there is a like extension of all the rights

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and burdens enjoyed and borne in the city before the extension, my first enquiry will be, into the rights, privileges, &c. of the city as originally founded; next, into the consequences of the annexation of the Faubourg St. Mary and that of the Faubourg Delord.

For the better understanding of the conclusions to which I have come, I am to examine the effect of the plan of the city of New Orleans, as originally laid out on the ground which it covers, and the part of the river in front of it. The plan is conclusive evidence of the intention of the founder to retain no property on any part of the ground within the designated limits except the square before the church and the lots, which appear to have been intended for the occupation of individuals who might obtain them by sale or donation. The square being marked *Place D'Armes*, was evidently reserved for military purposes, and it is an historical fact that between the years 1730 and 1757 barracks were built on it along Saint Peter and Saint Anne streets. Our jurisprudence is unacquainted with the division of property known to the Romans as *Res Sacre*.

The spot marked on the plan for a church has been viewed as a donation to the religious order, who exercised the clerical functions in the colony. In no part of the plan is there designated any lots to the particular use of the city, for jails, market-houses, town halls, &c. &c. So that with the exception of the spot for the church, the square before it, and the lots, every inch of ground comes under the denomination of a *locus publicus*, or ground dedicated to the public as streets, quay, etc., etc., for the benefit not only of the inhabitants of the city and of the colony but of all the subjects of the King and even of aliens.

This conclusion rests upon the principle that the plan having separated by distinct lines what was retained by the founders for future disposition, all the rest was evidently abandoned by them.

The nature of the right thus acquired by the public was one

of absolute property and not of use only. When the whole or any part of a *locus publicus* ceases to be applicable to its original destination, the sovereign, who has the regulation of the use of *loci publici*, may direct its future application to any other object of common utility to the inhabitants of the place, and if necessary to order the sale of it on a ground rent for the benefit of the city, or apply the proceeds of the sale in the same manner.

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In order to establish that there is no need of any other evidence in the plan of a city of the dedication of any part of the ground covered by it to the public, except the *negative one* which results from its not being laid out into lots or in any other manner designated as intended for another object, I refer to the decision of the Supreme Court of the United States in the case of *Cincinnati vs. the Lessee of White*; 6 Peters, 432. With regard to the whole space between Front street and the river in that case, the court grounded their opinion on the circumstance that this space was left open and not divided into lots.

That decision was the basis of my opinion in the case of *Cucullu & De Armas vs. the Mayor et al.*, which was sanctioned by the Supreme Court of the United States in the case of the *Mayor, &c. vs. the United States in error*.—10 Peters, 662.

In order to show that the public have the absolute property and not the use only of *loci publici* I refer to the cases cited in *Cucullu et al. vs. the Mayor et al*; 5 La. Rep., 132. In one of which the French King ordered houses to be built upon a quay, reserving a ground rent thereon for the use of the city; the right of which would have expired on that part of the quay ceasing to be applicable to its original destination, if the sovereign or founder had parted only with the use.

If the Supreme Court of the United States had thought that the West India Company parted only with the use of the quay or large strip of ground in front of the city of New Orleans, they would have given judgment for the United States in the case of the *Mayor vs. the United States in error*, for that por-

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tion of the quay which had been divided into squares and lots and sold, as this part of the quay had ceased to be applicable to its original destination; for the United States had succeeded to the rights of the West India Company by the treaty of cession, and would have succeeded to the ownership of the property if the use only had been granted.

I am now to examine the effect of the plan on the part of the river in front of the city, or rather the port of New Orleans.

A sea port consists of two principal parts: the one within and the other without the river. The first is that on which vessels lie at anchor, and was by the Romans called *statio*.

“*Stationem dicimus à statuendo. Is igitur locus demonstratur, ubicunque naves tuto stare passunt.*”—ff. lib. 43, tit. 12, l. 1, sec. 13.

The second is that part on land destined to the reception of merchandize landed or to be shipped; in the plan this is called the Quai. It includes the whole space between the levee and the first line of lots, for the word “*Quai*,” is written twice thereon at an equal distance from the lots and the levee. This latter part as well as the other is public, for the law says “*Flumina et portus publica sunt.*” If the part which was within the river was the only one that was public it would have been useless to have told us, “*Flumina et portus publica sunt.*” It would have sufficed to have said “*Flumina publica sunt,*” for the river includes the *statio* and after having told us that the whole was public it would have been useless to have said that a part was so.

This view of the subject is supported by the authority of Sir Matthew Hale, in his treatise, “*De Portibus Maris.*”

“A port is quid aggregatum, consisting of somewhat that is natural, viz: an access to the sea, whereby ships may conveniently come; a safe situation against winds where they may conveniently lie; and a good shore where they may well unlade.”

“Something that is artificial, as keys and wharfs and crams and warehouses and houses of common receipt; and some-

thing that is civil, viz: privileges and franchises, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.”

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The Quai being a public place lying between the lots and the river would prevent the owners of the lots from having any property in the banks of the river, even if any such could be held by individuals within a port; for the lots are not contiguous thereto; and in a sea port exclusively destined to commerce, the property of any individual is inconsistent with the destination of that part of the port.

Elsewhere, the banks of the river are the property of the owners of contiguous estates, although the public has the use of them; a fisherman may fasten his bark to the trees on the banks; he may erect a hut or cabin to shelter himself from the weather; he may dry his net thereon; all have a right to a tow-path; but in a sea-port there are no trees to which a bark may be fastened; the extension of a net to dry could never be permitted; no hut or cabin could be tolerated; no tow-path is needed or could be used; no property in the bank can exist in any individual, because the bank is part of the port and the whole port is public; besides there is no private estate contiguous to the river; the ground contiguous thereto having been dedicated to the public as a Quai, or part of the port, and as such not being susceptible of private ownership, and being *hors de commerce*. It therefore follows that if an alluvion was formed in the port it would partake of the nature of the ground contiguous to the river, and be, like it, a *locus publicus*.

A second reason why the alluvion thus formed should not become the property of the owner of the lot immediately opposite thereto, is, that the city must be the immediate sufferer by the first encroachment of the river. If the levee, the quai, or the street which runs along the first line of lots be carried away, a new levee, a new quai and a new street must be provided out of the coffers of the city. The levee must be maintained and repaired in the same manner. To these charges the owners of the lots on Levee street do not contribute one

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cent more than the owner of any other lot in the city. If the owner of every lot must be an equal sufferer from the action of the river on the bank how can it be said that the owners of those in the front street are exclusively to enjoy the benefit of alluvion? “*Eum sequantur commoda, quem sequuntur incommoda.*” A third reason is, that every lot appears by the plan to be an *ager limitatus*. It has been urged—first, either that there is no *ager limitatus* or else that all fields are *agri limitati*; in other words, that the doctrine of *ager limitatus* does not exist. I think it does: every field that is not bounded by water is an *ager limitatus*, for it cannot be diminished except by an earthquake, which is an event so rare as not to be taken into view in the regulation of civil rights, nor can it be increased. Every field that has a sea, lake or river for one of its boundaries, is susceptible of increase or diminution; the first is an *ager limitatus*; the second an *ager arcifinious*.

All the lots in New Orleans are *agri limitati*, for as the street runs along the river in front of them none of them are bounded by the river; and as the street is not at their risk and charge, they cannot be injured by the action of the water thereon.

The law “*in agris*,” is urged to be an act of positive legislation: the application of it to land granted to soldiers is indeed of this kind, for the reason expressed in the law itself, to wit: that it might be known what lands remained at the disposal of the State after the distribution to the soldiers.

A similar instance exists in the laws of the United States in regard to the division of public lands, into ranges, townships, sections, etc.

A fourth reason is the intervention of a street between the lots and the river. One of the counsel for the defendants (Mr. Hunt) denies this position and contends absolutely that the intervention of a public road does not form an obstacle to the acquisition of the alluvion; and relies on the decision of this court in the case of *Morgan vs. Livingston*, 6 Martin, p. 19;

and he reminds me, that I had the honor of being the organ of the court in that case.

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The reasons for the opinion there given will be stated hereafter.

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This case cannot avail him, for the plaintiff claimed his title to the alluvion through several mesne conveyances from the original grantee ; and it was allowed to him avowedly on the ground, that, as successor to that grantee he was bound to keep up the road, and if it was lost to furnish another ; and that the property was still rural, the assent of the Spanish government to the erection of Gravier's faubourg, not having been given until the arrival of the Baron de Carondelet in Louisiana several years after Gravier's sale to Poeyfarré, under whom the plaintiff claimed.

The other case on which this counsel relies is one of the Court of Cassation. That tribunal formed its judgment on an article of the Code Napoleon, the examination of which would not assist us, and on several laws quoted from the Corpus Juris Civilis.

It appears to me that we cannot allow to the defendants the benefit of the Roman laws if they be invoked for the purpose of establishing that an estate not bound to furnish a new road on the destruction of the old one, is entitled to the alluvion notwithstanding the intervention of a road ; for in that respect they are not declaratory of the natural law nor grounded thereon ; but on the contrary, are positive and arbitrary laws, deriving all their force not from reason but from the will of the prince. Grotius holds that there is no principle of the natural law which justifies the position that the owners of estates, separated by a public road from the river, have a right to the alluvion, unless it be an estate which owes the road, "qui viam debet."—Gro. de j., b. et p. 2, 8, 17.

If the law under consideration is to be extended to a case in which the soil of the road be the property of a parish, it is derogatory to, and in direct violation of the natural law, for in that case the benefit and the burden are separated ; the benefit goes

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to the owner of the estate, and the loss is borne by the parish.

Let us, however, examine those Roman laws on which the Court of Cassation relies. They first refer us to the law "*Præterea*" of the Institutes, which defines the alluvion; next, to the law "*in agris limitatis*," of the Digest; next, to the Institutes, lib. 2, tit. 1, sec. 4, "*Riparum*;" and lastly to the law "*Atticus*," ff. 41, 1, 38.

None of these except the law *Atticus* supports the proposition that the intervention of a highway between a river and a field does not prevent the acquisition of alluvion by the latter, and this law gives as a reason for the acquisition that the field owes the road; id est, as Grotius says, a field, "*qui debet viam*."

"*Nec tamen impedimento viam esse (ait,) quo minus ager, qui trans viam alluvioni relictus est, Attii fieret; nam ipsa quoque via fundi esset.*"—ff. 41, 1, 38.

"*Fundi, et per hoc Attii, quod est verum quantum ad emolumentum non ad proprietatem.*" "*Item quo ad incommodum, quia si quandoque destruitur, ex eodem fundo juxta quod est reparatur.*" There are other laws in the Digest to the same effect: "*Aem via publica vel fluminis inpetu vel ruina amissa est, vicinus proximus viam præstare debet.*" ff. 8. 6. 14. Gothofredi has the following note, "*sed impensa publica*," but the Gloss. adds, "*sed contra observatur.*" "*Si viæ publicæ commeatus sit, vel via coactata, interveniunt magistratus.*"—ff. 43, 8, 1, 25. On this law, Gothofredi has the following note: "*Ut scilicet vicini, viam præstant.*" The neighbors are to furnish a road, but it is not said that they are to be paid for it.

From these I conclude that under the Roman law, highways were charges on the estates through which they run; and I presume that they are so in France, otherwise the law *Atticus* does not support the decision of the Court of Cassation. That court has however held in a decree of the 12th December, 1832, ch. civ. 13 Sirey 1, 1, that the communes, being owners of vicinal ways (*chemins vicinaux*) and bound to keep them in order and to refurnish them if there be occasion for it,

are alone entitled to the alluvion formed before them : as in the case cited by the counsel, the owner of the estate over the way is entitled to the alluvion. The probable ground of the distinction is, that in a chemin communal, the estate before which it was is bound to furnish another in case of its destruction.

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Taking these two decisions of the Court of Cassation as my guide, I must say that, as the owner of a lot in New Orleans is not bound to furnish another street, if the former be destroyed, the intervention of the street prevents the acquisition of alluvion by the lot. One of the learned counsel has, however, urged, that a new street must be furnished by the owners of the contiguous lots. He has cited no authority, but has supported his position on the alleged ground, that the owner of the lot is the riparian proprietor. This cannot be admitted. First, because the intervention of the street prevents the lot from being riparian. Second, because riparian estates on the Mississippi are bound to furnish a road, in consequence of an express clause in the grant, which binds them thereto ; and there is no such clause in the grant of the lot. I conclude then, that none of the lots in the city of New Orleans can have any right to the alluvion formed before them.

The Supreme Court of the United States has taught me, that such an alluvion belongs to the city as a *locus publicus*, because, "if it claim the original dedication to the river, it has all the rights and privileges of riparian proprietor." Mayor vs. U. S. in Error, 10 Peters, 717. We have already seen, that it has all the riparian burdens.

I am now to enquire whether there is any difference with regard to the ground covered by the Faubourg St. Mary, which is immediately above the city and contiguous thereto.

Whatever evidence of the dedication to public use by the founder of the city of New Orleans results from the plan, which preceded the sale of lots therein, must result of the like dedication by Gravier from the plan of his faubourg ; for Gravier was as much the founder of his faubourg as the West India Company was of the city.

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This plan is evidently that of a continuation and extension of the city ; all the streets of New Orleans are continued through the faubourg. The river forming a curve at the end of the city, a new row of squares was added, and the first or front street of the city became the second of the faubourg.

The whole space between the new row of squares and the levee was left open, evidently as the quai of the faubourg.

Where the plan of a City or Faubourg fronting on a navigable river, or the sea, has an open space between the front row of houses or street, and the water, it becomes part of the port, and is a *locus publicus*, dedicated to public uses, without any other designation whatever.

In the case of Cucullu and De Armas vs. the Mayor, I adopted the suggestion of the counsel for the appellant, that the word quai, written twice on the space between the front lots and the levee, evidently shows, what would otherwise appear from a mere inspection of the plan, that the space was designated as a part of the port : and I reiterate that the absence of the word quai would not have made any impression on my mind, nor changed my opinion as to the right of the public in that space of ground.

The abandonment by Gravier of the whole ground beyond the levee as a *locus publicus*, was equally manifested by the plan, and still farther by the occupation and use which he permitted the people to make of it. From the year 1788 to 1806, the inhabitants of New Orleans resorted to the large alluvion which had been formed beyond the levee, for sand, to raise the streets and lots, as they would have resorted to a common of turbary for the purpose of getting turf, without ever having been disturbed by the former owner. And we are informed by the court, in the case of Gravier vs. the Mayor, hereafter quoted, that he made abundant declarations of his having abandoned the land beyond the levee to the public use ; declarations which confirm the evidence, which results from his plan and conduct.

In the latter year his heir, probably at the suggestion of others, resorted to a suit against the Mayor and Aldermen of the city of New Orleans, to be quieted in the possession of that alluvion. His claim was resisted on the ground, that his ancestor had abandoned and dedicated to the public use as a *locus publicus*, all the space before the front row of squares in

the faubourg. No evidence of this abandonment and dedication was offered, except the *parol evidence* of declarations which he had made to that effect. There was no attempt to prove this dedication by the production of plans, as in the case of Cucullu and De Armas against the Mayor et al.; and in the Supreme Court of the United States, in the case of the Mayor vs. United States in Error, 10 Peters, 622; or of other written evidence. The plaintiff succeeded through the gross neglect of his opponent, in failing to produce legal evidence.

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Judge Matthews, in delivering the opinion of the court, said, "*The evidence of abandonment is merely conversation which passed a long time ago. It would be dangerous to divest a man of his property upon evidence of such declarations, without any proof of a consideration.*" 1st Condensed Reports, 454.

The anonymous counsel for the plaintiffs very appropriately observes, "The great mass of mankind have a clear and, as it were, intuitive perception of what is just and right; and though it be not always able to assign a satisfactory reason for its opinions, it rarely errs in the judgment which it forms, especially on questions involved in controversies, publicly discussed."

"The tenacity with which the inhabitants of New Orleans have adhered to the belief, that the city was the owner of the batture in front of it, is truly surprising, and affords a strong presumption in favor of the rights of the city."

In August, 1813, as Attorney General of the State, I instituted unsuccessful proceedings in the nature of an information against the vendee of Gravier's heir, claiming for the public use all the space between the levee and the river in front of the faubourg, as part of the port of New Orleans. But for reasons which cannot be mentioned here, no appeal was taken. In the year 1819, the city having lost all hope of success against this vendee, the proprietors of the lots in the faubourg, fronting the levee, instituted several suits, in order to claim the alluvion before the respective lots as their property. One of them, that

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of Morgan vs. Livingston, was tried and, by consent, brought to the Supreme Court, with the intention, that the judgment pronounced thereon, would put an end to all the other suits. I was then a member of this tribunal. One of my colleagues was the judge of the superior court of the territory, who had drawn the judgment of that court in 1807. The other had received a power of attorney from some of the heirs of Gravier in France, who had retained their interest in his succession, and this power containing a clause of substitution, he had availed himself of it by a substitution, in favor of the son-in-law of the parish judge, from whose court the appeal came up. The latter member of this court having declined sitting in this case, it was submitted to the other two, to wit, the late presiding judge and myself. Entertaining the opinion, on which I acted as Attorney General in 1813, I insisted on declaring that the premises were a locus publicus, not susceptible of private ownership, and hors de commerce, on the same principles I had laid down as to a public road, in the case of Renthorp et al. vs. Bourg et ux., under circumstances somewhat similar, 4 Martin, 97. My colleague still entertaining the opinion he had formed in 1807, absolutely refused to concur with me, and after a delay of two years we agreed to act on the case, as it was placed before us, both of the parties having an interest to keep the public claim out of view. My colleague consented to abandon the claim of the defendant, and I drew the judgment, which is printed in the sixth volume of my reports. The defendant complained to the Legislature, and made an unsuccessful attempt to have us impeached. On the return of the case to the Parish court, the judge thought it improper to proceed to the trial of the cases of the other front proprietors, as he might be charged with partiality, his son-in-law being the substituted attorney in fact of one of the parties interested. The suits were therefore dismissed, and brought in the district court; from which they were removed to the court of the United States for the Louisiana District.

It is believed, that the plaintiffs, alarmed at the trouble of following their suits to the city of Washington, made a compromise by abandoning one half of their supposed claims.

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Shortly after, a more important compromise was made between the Mayor, Aldermen, &c., of the city, the vendee of some of Gravier's heirs, and some of his other heirs, so that a line was drawn parallel to the levee, at a certain distance from it, and the alluvion beyond it was abandoned to the city.

In the case of Gravier vs. the Mayor, 1st Condensed Reports, p. 551, the Superior Court of the late territory held, "that Bertrand Gravier had divested himself of all title to that part of his tract on which the Faubourg St. Mary is established by selling the lots fronting and adjoining the highways, and if no alluvion existed at the time when Bertrand Gravier ceased to be the owner of the land adjoining the high road, that an alluvion afterwards formed would not become the property of Bertrand Gravier."

The court gave as a reason for this opinion, "that if Bertrand Gravier could be considered as the proprietor of the road or of the levee lying between this road and the river, he would nevertheless not possess that title of property which gives the right of alluvion, for that the destruction of this property by the encroachment of the river would be a public and not a private loss, since it could not be appropriated to the use of any individual and the said road and levee would have become necessarily liable to be kept in repair at the public expense."

This opinion of the court will receive considerable support from what will be shown hereafter, to wit: That the bank of the river can neither be alienated nor be retained in separate ownership from the contiguous estate and therefore must either belong to the public or to the owners of lots in the faubourgs as a concrete body.

It is in accordance with this principle that this court held in the cases of Packwood vs. Walden and Cochran et al. vs. Fort et al., that alluvions now formed before the city, are *loci publici*. I

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The Batture which formed in front of the Faubourgs of the City of New Orleans, after their incorporation with the City, became the property of the City and not of the front proprietors.

coincide with this opinion and believe that Gravier could not be considered as owner of the levee or bank of the river after he had ceased to own the riparious estate.

I was a member of this court and concurred in the opinions in those cases. One of the counsel for the defendants in commenting upon the judgment in the latter case, observes: "The learned judge (Porter) who pronounced the decree in the fervor and glow of composition supposes a case which did not in reality exist, and expresses upon it a hasty opinion, thrown out incautiously and without sufficient reflection," to wit: "that if the batture be formed after the incorporation of the faubourg with the city, it became the property of the city and not of the front proprietors." This was indeed an obiter dictum but clearly resulted from a consideration of the case before the court. I then thought and still think that this court gave a correct exposition of the law of alluvion. This was the jurisprudence of the Superior Court of the late territory and of the Supreme Court of the State for upwards of a quarter of a century, to wit: from the year 1807 to the year 1834, when Judge Porter left this court. Every judge that sat in these courts appears to have concurred in the establishment of it; there never was a dissenting opinion among us in this respect; and I never felt any dissatisfaction therewith. In the case of *New Orleans vs. the United States in error*, 10 Peters, 717, the Supreme Court of the United States thought, that "if the dedication to public use of the ground before the city of New Orleans be established it would be of the highest importance that the vacant space by alluvial formations should partake of the same character and be subject to the same use as the soil to which it becomes united." They added: "if this was not the case, by the continual deposits of the Mississippi, the city of New Orleans would in the course of a few years be cut off from the river and its prosperity impaired." "If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor." "But there is another consideration of great weight on this subject. It appears

that the city from time immemorial has been compelled to construct at great expense and keep in repair levees which resist the waters of the river and preserve the city from inundation."

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In applying to the Faubourg St. Mary, the principles which the Supreme Court of the nation recognized in the above cases as regulating the rights of the city, as to that portion of it which is covered by the plan made by the West India Company, it does not appear to me that this court errs. The dedication to public use of the ground between the levee and the first row of houses in front of the Faubourg St. Mary has been shown. Is it not then of the highest importance that the accumulations by alluvial formations should partake of the same character and be subject to the same use as the soil to which it becomes united?

If this was not the case, by the continual deposits of the Mississippi would not the city in the course of a few years be cut off from the river, and its prosperity impaired? As the city justly claims the land to the river has it not all the rights and privileges of a riparian proprietor? Does this not result also from the consideration that the city has constructed and kept in repair the levee? Conscious that no one of these queries can be correctly answered in the negative, I cannot admit that Judge Porter's exposition above quoted is not perfectly correct. On enquiry I cannot learn that there is any country governed by the civil law, in which there is a city situated on a navigable river, lake or sea shore, where there is a port, in which the landing place or port is not a locus publicus, on which individuals have not any such rights as are claimed for the defendants, and if this be the case, it is strong evidence of the practical rule of law that no such right exists.

In countries governed by the civil law, the ports or landing places of cities situated on navigable rivers, lakes or the sea, are *locus publicus*, in which individuals have no right of property.

Alluvions formed before the city may be considered in two points of view:

First. As partaking of the nature of the locus publicus immediately contiguous to the river and assuming its character; and

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it is only as a *locus publicus* that it is claimed in the present suit.

Secondly. As belonging to those who bear the burden of riparious ownership; which in a city are not the owners of front lots; because they in no case bear any of the burdens of riparious ownership. They do not bear any more of the expenses of maintaining the levee or furnishing the streets than the owners of any other lots. If the alluvion be the *commo-dum* which corresponds to the *incommodum* of a riparious estate, the alluvion must accrue to the benefit of all the owners of lots in the city, not individually but as a concrete body, whose rights are to be vindicated by the Municipal authorities. It is in this view that the Supreme Court of the United States considered the city as a riparious owner. In the case under consideration it is useless to consider whether the alluvion before the city be a *locus publicus*, or the property of all the owners of lots in the manner above stated. Some of the counsel have urged that the river might carry away not only the levee but the quai and the street, and thus the front lot might be required for those purposes, and even further, that these lots themselves might be carried away by the action of the river. These events are possible; but the contingencies are so remote as not to be a basis for legal reasoning. In laying out cities on the bank of a river where the cupidity of individuals does not interfere, it is usual to leave such a margin of land between the first line of lots and the river, that by no event in the ordinary course of things, could the first line of lots be interfered with by the river. But if it should happen otherwise it would require but a feeble appeal to the common sense and justice of his fellow citizens for the owner of a front lot to establish that if his lot be taken from him for a levee, quai or street he must be compensated for it.

I believe that what I have said in the first part of this opinion, as to the port, the quai, and the bank of the river before the original city of New Orleans, is applicable to the same objects in the faubourg St. Mary, and also to the faubourgs Delord and

Saulet, within which is the *locus in quo*, which is the subject of the present suit. In the year 1805, the Legislative Council of the Territory of Orleans, incorporated the city of New Orleans, extending its limits over the faubourg St. Mary and a considerable distance above. Madame Delord was the owner of a plantation, immediately adjoining the faubourg St. Mary; and in the following year she sought to avail herself of the advantages, which the annexation of her estate to the city offered, and divided her plantation by streets, parallel and perpendicular to the river, into squares and lots; and her plan expresses to have been made for the extension and continuation of the faubourg St. Mary, and what is the same thing, of the city of New Orleans. We see on it a street immediately in front of the levee, and running alongside of it, which is called New Levee street.

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About the same time Saulet, the owner of the plantation above, and contiguous to the preceding, imitated his neighbor. His plan is avowedly made for the extension of her faubourg, is divided in the same manner, and New Levee street is continued through it. The plans of both the faubourgs, if my opinion in the case of Cucullu and De Armas vs. the Mayor, &c., and that of the Supreme Court of the United States, 10 Peters, 662, be correct, establish the fact, that the former proprietors of these faubourgs, as founders of a new part of the city, divested themselves of all interest in every part of them, except in the lots which the plans presented as objects of sale to individuals in that portion of the estate, which had been divided into squares, lots and streets; to wit, from the levee to a street in the rear of the last row of lots: all the rest was dedicated to the public; that is to say, all the streets, and the land between New Levee street and the river as a quai; these were *loci publici, hors de commerce*, and destined to the use not only of the inhabitants of these faubourgs, of those of the rest of the city of New Orleans, of which these faubourgs formed a part, and of the State, but also of the inhabitants of any other country.

The plans of Faubourgs Delord and Saulet laying off these plantations into City lots and squares, divested the owners of all interest, except in the lots and squares sold to individuals, &c. All the rest was dedicated to the public. The land or space between New Levee street and the river became a *locus publicus*, destined to the public use. This dedication required no further evidence than the plan and the use of these places by the public.

This dedication required no other evidence than the plan

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and the use of those places by the public. This use, for upwards of thirty-five years, has been a matter of public notoriety, and the presumption is extremely strong, that it began immediately after the division of the faubourgs into streets, and squares, and lots.

The ground between New Levee street and the levee as a quai, the levee or bank and that part of the river, where the ships were to lie, constituted the port of New Orleans, in front of the faubourg Delord. The obligation, under which Madame Delord had been, to furnish a royal road, according to the king's grant to her author, had been complied with, by giving through her estate the road now known as Tchoupitoulas street. The obligation, to maintain the levee, being a real and not a personal one, vanished as to her, except as a lot owner, on the sale of the lots; for then it bore on all the estate, on which the burden of the levee had been imposed; and that burden, like a rent charge, bore on every part of the estate.

The ground, which had now become the property of the public, *loci publici*, by the consent of the sovereign, had been impliedly exempted from the burden, because the State which had succeeded to the rights of the former sovereign and original grantor, by extending the limits of the city of New Orleans over these estates, had consented, that as urban estates, they should be subdivided into squares and lots, and intersected, as in the rest of the city, by streets, and the whole burden of riparian ownership remained on the lots, until assumed by the city.

As we have already seen in the case of Gravier, with regard to the faubourg St. Mary, Madame Delord, after the sale of all the lots in her faubourg, was without any interest in the levee or bank of the river, and the repairing and replacing the levee could not be a burden on her, since it never was a personal one, and she had parted with the estate, which was encumbered therewith. So long as the proprietors of the lots bore the portions of this burden, with which their respective lots were chargeable, they acquitted a part of the price for which they

had purchased their lots; for a portion of that price was the assumption of a part of the charge which bore upon the whole estate.

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The extension of the limits of the city of New Orleans over the estate of Madame Delord, by the act of 1805, could not change its character, or affect it without her consent. We have the evidence of this consent in the intention which she manifested almost immediately, to avail herself of the advantages which the inclusion of her estate within the city presented. This evidence results from the plan which she published in February, 1806, expressly made for the continuation and extension of the city over her estate, and the subsequent sale of lots in accordance with it.

By this plan the character of her estate was instantly changed. She retained no part of it, except the lots into which it was divided; all the streets, and principally the whole space between the margin of the river and the front lots were dedicated to the public use, became loci publici, and were ipso facto hors de commerce. If this view of the subject be correct, no act of Madame Delord, with regard to any part of the ground outside of New Levee street, in making sales thereof, can be considered in any other light, than as done in violation and ignorance of her own plan and of the rights of the public. And the little attention that was paid to these remote parts of the city by the municipal authorities, who confined their care to the square of the city, account for these invasions and irregularities.

It is further to be considered, that the acts of Madame Delord, with regard to any portions of the batture, merely release or abandon her claims and pretensions thereto, but give no substantive title to her vendees, and this mode of transfer of itself, manifests her own want of confidence in any right to the batture.

The port of New Orleans was extended over that part of the river, in front of the new faubourg, which was susceptible of being occupied by vessels lying at anchor or fastened to the bank, and over the levee and portion of land out and inside of

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it, which might be necessary for the reception of merchandize landed or to be shipped. Both these parts of the port became public, and if the opinion, which I have expressed when examining the original plan of the city, be not incorrect, no part of this port was susceptible of private ownership. Madame Delord, by destroying the contiguity to the river of the estate which she retained, abandoned all claim to the banks.

The defendants urge that their rights and those of the persons, under whom they claim, have been frequently recognized by the Mayor and Aldermen of the city, and by the plaintiffs, by putting them in possession of sundry portions of the batture, &c., by charging them with riparian burdens and duties, and by doing various other acts and things, &c., &c. These allegations, if proven, would have considerable force, if the plaintiffs sued in the right of the Municipality, or if they claimed any thing belonging to the corporation; but they only vindicate the right of the public to loci publici, things out of commerce, and in which the corporation, represented by the plaintiffs, can have no property. The dedication to public use being once established, cannot be affected by any act of the municipal officers.

The plea of prescription cannot be invoked in regard to what is hors de commerce, and not susceptible of private ownership or even possession.

Nothing, which should govern this case, should be drawn from the acts of the corporation. It was well known to every one, familiar with the history of the city, in what feeble hands its administration had been for a long time placed. That numerous abandonments and violations of public and even of municipal rights, duties and obligations had been constantly permitted; and we have only to instance the sale of the squares between the front of the original city and the levee, though the Legislature afterwards thought fit to sanction it. Other instances of similar conduct are well known; that in many of their ordinances, which have been submitted to, there has been manifested great ignorance of their own rights and duties, as

well as of those of the citizens. With a knowledge of these facts, but little importance should be attached to their acts as evidence of the rights of the public on any subject whatever.

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I will now proceed to notice some of the leading arguments of the counsel for the defendants.

It is urged that the alluvion has no necessary connection with the levee, and as a deduction from this, that a proprietor may sell the body of his estate, and retain the ownership of the bank of the river. The Civil Code, Art. 448, says, "on the Mississippi, where there are levees, the levees shall form the banks;" and as the alluvion is an accretion to the bank, there is a necessary connection between the alluvion and the levee. Authorities have been cited from common law writers, to show that a riparian owner may sell his right on the bank, separately from the estate. The converse of this is the rule of the Civil Law. Cæpola, the author which the counsel has placed before us, expressly says, (page 447,) "*ripæ non venduntur, sed magis accedunt rei venditæ; quod apparet: quia per se vendi non possunt cum riparum usus sit publicus, de jure gen. ut d. leg. riparum, nam proprietās sola per se esset inutilis.*"

If the matter was *res nova*, I would say, that the sale of the trapezium was illegal. We have seen, that it was outside of the levee and unconnected with any land on the inside. The bank being a legal accessory to the contiguous estate, cannot be sold separately from it, nor retained when the estate is sold. It is like a right of way, which cannot be separated from the creditor estate, nor retained when the latter is sold.

But the municipal officers have slept over the rights of the city, in permitting the vendees of the defendants, mediate or immediate, and the defendants themselves for a long time, to occupy and improve the trapezium and the alluvion formed thereon as their private property, and in consequence thereof, the defendants have acquired equitable rights, which must now protect them.

The defendants' counsel have further urged, that the plaintiffs have compelled them by several ordinances, after their ad-

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mission into the city, within the period of nearly a quarter of a century, from 1806 to 1831, to support all the riparian charges as rural owners.

To this the same answer may be given, as was given to the alleged recognition of their rights by the plaintiffs, and other acts of theirs set forth in the answer. The plaintiffs do not sue in their own right, nor for any thing belonging to the corporation, but only vindicate the right of the public in *loci publici*.

The dedication being established, cannot be affected by any act of the plaintiffs.

Perhaps the burden of riparian duties was more than compensated by an exemption from all city taxation, which the inhabitants of the faubourg have enjoyed until the year 1831. Had the levee been made through the faubourg by the corporation, they would have been chargeable in common with all the other inhabitants, with the expense of supporting the levee through the whole extent of the city and the faubourgs. Perhaps they might have compelled the city to maintain their levees at the general expense, but refrained from doing so, to avoid taxation.

Much reliance has been placed on the judgments in the two cases of Henderson et al. vs. the Mayor et al. Both of these were made on admissions by the predecessors of the plaintiffs, which, in my opinion, were made either in ignorance or in violation of the rights of the public. As these rights are inalienable, they cannot be destroyed by admissions, made by those whose duty it is to protect them. But judgments obtained upon such admissions, must form a very equitable claim in favor of those who obtained them, and ought not to be disturbed, so far as regards the direct subject matter of the decision, though they cannot be extended beyond it.

Corporations in the Civil Law, are considered as in a continual state of pupillage; and their administrators as the tutors of minors. Until very lately, minors were entitled to relief in all cases, in which they could show, that a proper defence had

not been made for them. It is not very clear, that the same right does not exist in favor of a corporation, whose interests have been neglected by its administrators. In those cases, the city might have sacrificed its own right, but not that of the public. This is not said with a view of intimating, that those judgments ought not to have their effect, in regard to what is the actual subject of the decision; but they ought not to operate beyond the strictest limits of the matter passed upon.

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It appears to me that the idea of *res judicata*, which has been so much pressed upon the court, did not arise from the decisions themselves, but from the supposed effect of the admissions which had been made in these cases. Admissions made by private individuals in the course of litigation, will bind their rights, and have the effect of alienating them, unless shown to have been made in error; but admissions made by parties, who have not the power of alienation, have not the same effect.

A singular fatality seems to have attended every attempt on the part of the city, to assert its claim on the object of litigation. It has been seen, no evidence of the plan of the faubourg St. Mary was produced, and parol dedication and abandonment was alone relied on; although the plans could easily have been procured, being in the archives of the city.

In the case of Cucullu and De Armas, the subject matter of the suit had been adjudicated upon in a previous one, of Gonzales vs. the Mayor, in the Superior Court of the Territory, and the counsel had pleaded this suit as *res judicata*. He had even ordered a copy of the record to be made, but omitted to give it in evidence, and by this strange and fatal omission, the city lost that case; for the plea of *res judicata* would unquestionably have been sustained.

In the case of Henderson vs. the Mayor, it has been seen also what admissions were made prejudicial to the interests of the city; and I fear, that the consequences of these mistakes have been injurious to the assertion of the public rights in the present case.

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In the very important case of Cucullu and De Armas, so often referred to, I was under the necessity of dissenting from the majority of the court.

But in looking back and reviewing what had been decided upon on that occasion, I see nothing, in my opinion, which I would change or modify; and I have the satisfaction of knowing, that my views in that case were substantially sanctioned by the highest tribunal of the nation.

I should greatly have distrusted my own opinion, in being the sole dissenter from that of my able and learned colleagues in the present case, but that the subject is one which I have so long and so fully considered, and that the difference of our opinions is so radical, that no middle course can be pursued.

After all that has been said, written and printed on this case, it appears to me, that it may be reduced to a single inquiry, viz., who is the owner of the bank of the river in front of the city of New Orleans and of its faubourgs? For that the alluvion belongs to the owner of the bank of the river, I do not understand to be denied by any one; and from the facts I can come to no other conclusion, than that the public is the owner of the bank of the river, and therefore entitled to the alluvion.

After giving the subject the best consideration in my power and regarding it in all its aspects, "I am of opinion, that the judgment of the Parish Court is correct. If it be reversed, I am apprehensive that the consequences depicted by the Supreme Court of the United States in the case of New Orleans vs. the United States, in Error, 10 Peters, 717, will result. "By the continual deposits of the Mississippi, the city of New Orleans would, in the course of a few years, be cut off from the river, and its prosperity impaired." It is also obvious, that it will give rise to a series of private intrigues, the object of which will be to extend wharves, thereby increase the alluvion, and carry the levee near to the margin of the river, with a view to give new acquisitions to individuals, and create an interest adverse to that of the public.

Upon the whole matter, therefore, I have come to the conclusion,

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First. That the founders of a city or faubourg on the banks of a navigable river do by the plan and the acts of sale of lots in accordance therewith, make a dedication of all the land within the limits of such city or faubourg which is not by the plan reserved for the purposes of lots to be sold; and especially of all such parts of the land, of which the public have the useful domain, and which are essential to the prosperity of a city or faubourg so situated; to wit: the streets and bank of the river; and that the attempt on the part of the defendants, assigns of the original founders, to resume a part of the land so dedicated and abandoned, is a violation of the contract rights of the purchasers of lots and of the public, and tends to impair the original contract.

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Secondly. That the founders of a sea port city or faubourg on the banks of a navigable river, do by the plan of the city or faubourg so founded, intend to create a port, and that the river and the land adjoining the river in front of such city or faubourg, necessary for the purposes of lading and unlading merchandize and of commerce in general, constitute the port, which is locus publicus, and that the destination and dedication of land so situated is especially to be presumed, as well from the plan as from the intention to found such city or faubourg, and is clearly evidenced in the present case.

Thirdly. That the levee or bank of the river, being an accessory to the principal estate, cannot be separated from it by any act or intention of parties.

Fourthly. That alluvion formed in a port partakes of its nature and of that of the street immediately along the river, is locus publicus, hors de commerce, and does not belong to the owners of the front or of any other lots in the city.

Fifthly. That the corporations of the city having stood by and permitted individuals to expend large sums of money, and make purchases of the property in dispute and in some measure recognized their rights, the latter have acquired an equi-

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table title thereto and ought not now to be disturbed ; but the rights of the public as to what is not in the actual possession of the defendants must not be affected by the judgments which they have obtained.

I am therefore of opinion that the judgment of the Parish Court be affirmed.

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The *use* of batture *outside* of the levee, is vested in the public, but the *ownership* or *title to the soil* is vested in the front proprietors of lots, or the land to which the batture attaches or forms.

The corporation or municipality is the administrator of the *use* of the batture for the public, outside of the levee, and have the right of taking earth for the construction of embankments, levees and wharves for the *public use on the batture* along its whole extent within the corporate limits of the city ; and also for improving the port, and the streets and avenues leading to it.

The plaintiffs allege they are the owners and have been in the undisturbed possession of six lots, composing a square or islet of ground in the Faubourg Delord, fronting on the river Mississippi and on New Levee, Benjamin and Suzette streets. That the authorities of the Municipality have illegally disturbed them in their said possession and committed various acts of trespass, injury and damage to their property ; more especially in digging and carrying away a large quantity of earth or dirt from their premises ; making large holes and rendering it unfit for use and destroying its value to their great damage more than \$20,000. They pray for an injunction, restraining and prohibiting the defendants from any further pro-

ceedings or committing any further acts or depredations on their said property, and that they have judgment for \$20,000 in damages.

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The defendants pleaded the general issue; and averred that they had a right to take earth from this *batture*. They pray that the injunction be dissolved with damages.

Upon these pleadings and issues the parties went to trial before the court and a jury.

The evidence showed that the premises or *locus in quo* was situated *outside* of the regularly established levee and front street; that Pulley, one of the plaintiffs, made a levee *in front of this property*, which was at some places *three* and at others *four feet high*, for the purpose of keeping the water out, and from being overflowed at high water; that he had built a dwelling house, stables, sheds and negro houses or huts. He carried on the lumber business. Some of the buildings erected by him were of brick and two stories high.

The corporation entered on this property for the purpose of making wharves, clearing it to make room for landing, lading and unlading merchandize, produce and other articles of trade and commerce; and to keep it open as part of the port of New Orleans.

The Municipality, for the purpose of filling in and erecting wharves, dug out a large square hole on the premises, from which they took the earth or a large quantity of dirt, which was used in filling up in front, and above and below the *batture* or property in front of which it was taken.

There was a mass of testimony taken and submitted to the jury, touching the situation of the property and the nature of the defendant's works and operations on the same. The judge presiding delivered an elaborate charge to the jury, defining the rights of the public to the banks and bed of the river; and particularly instructing them that the defendants had no right to dig and carry away earth and dirt from the premises. This charge is comprised in the opinion of the court, and need not be recapitulated.

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The jury returned a verdict for the plaintiffs, and assessed their damages at \$5000. From judgment confirming this verdict, the defendants appealed.

Preston & Roselius, for the plaintiffs.

C. M. Conrad & Lockett, for the defendants.

Garland, J. delivered the opinion of the court.

The petitioners allege that they are the joint proprietors and possessors of six lots of ground in the suburb Delord in this city, fronting on the river, and have been so for seven years past, that they have been disturbed in the enjoyment and possession of their property, by various persons acting under the authority of the City Council of the Second Municipality, entering upon their premises and committing various trespasses and injuring their property by digging and taking away a large quantity of earth and sand, making holes in the ground, so as to render it unfit for use and destroy its value. That if these acts are permitted and continued the property will be destroyed. They therefore pray that an injunction issue to restrain the defendants in their proceedings and for \$20,000 damages.

The answer is a general denial and an assertion of right to take earth from the batture.

Upon the trial a number of witnesses were examined and many things stated, which were no doubt intended to bear on a very important question which the plaintiffs wished to try, that is, to whom the batture in front of their property belonged. That question having been settled in the case of the present defendants vs. the New Orleans Cotton Press Company, (ante 122,) it is not now necessary to re-examine it. As to that question the case stated settles the rights of the present plaintiffs; they being in a situation so nearly similar to the Cotton Press Company as not to make any material distinction between their rights of property in reference to the present defendant. The question in relation to the trespass and damages is the only one now to be considered; and it is perhaps fortunate for a portion

of the public, this case comes up so soon after that one, as our decision will be a commentary upon it, and a practical illustration of the principles settled therein.

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The evidence shows that the plaintiffs being owners of the front lots, had used various means to raise the batture, by sinking or permitting sunken boats and other craft to remain on it; leaving various materials to mix with the mud deposited by the river. Pulley, one of the plaintiffs, without any authority from the City Council, made a levee on the batture outside the levee authorized by law, whereby he reclaimed and protected from inundation a considerable piece of ground, which he used as a lumber yard, for cutting up rafts of timber and flat boats for wood; he also had on it some stables and store houses or sheds for storing lime, hay and other articles, having a large grocery establishment near on one of his lots; all of which were valuable and produced a large annual revenue. Upon this place the agents of the corporation entered and dug one or more holes, about five feet in depth, about two hundred and fifty feet long, and one hundred feet wide; making about seven thousand cubic yards, taking the earth to use it in the construction of embankments, levees and wharves, which were then being constructed for public use on that batture and in the vicinity above and below it, under an ordinance of the Council. The effect of the operations of the agents of defendants, was to entirely break up Pulley's establishment on the batture.

The jury gave the plaintiffs \$5000 damages "for being deprived of the use of the premises and carrying away the earth," on which verdict a judgment was rendered and the defendants appealed.

We find a number of bills of exceptions to the admission of testimony, which it is unnecessary to decide as the cause will not be remanded; and as to those of both plaintiffs and defendants we shall despatch them all (some half dozen or more) at once. We think with the exception of the concluding portion of the judge's charge to the jury, he was correct in every particular, and we have incorporated it nearly verbatim into this

EASTERN DIS. opinion, as presenting as lucid an exposition of the law, as it is
May, 1841. in our power to give. He says :

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“Corporations of cities and towns may construct on the public places, in the beds of rivers, and on their banks, all buildings and other works necessary for public utility, for the mooring of vessels and the discharge of their cargoes, within their respective limits ; La. Code, art. 859.”

“The bed of a river is the space contained between its banks. The banks of a river are understood to be that which contains it in its ordinary state of high water ; on the banks of the Mississippi where there are levees, the levees form the banks ; Idem, 448.”

“The bed of rivers is public property, as long as it is covered with water ; Idem, 444.”

“The *use* of the banks of navigable rivers or streams is public ; accordingly every one has a right, freely to bring his vessels to land there, make fast the same to the trees which are there planted ; to unload his vessels, deposit his goods, dry his nets, and the like.”

“Nevertheless, the *property* of the banks of rivers, belongs to those who possess the adjacent lands ; Idem, 446.”

“The levees on the banks of the Mississippi being the banks of the river, the space between the levees being its bed, and the beds of rivers being public property, the property of the banks of rivers belonging to those who possess the adjacent lands, it follows that if the owners of lands adjacent to the banks or levees of the Mississippi, were allowed to advance their levees farther into the river ; or in other words to advance the banks, they would add a part of what before was the bed of the river, to their property.”

“By the first section of an act approved February 15th, 1808, (1 Moreau’s Dig., 651) it is provided that ‘no individual shall make any new levee, dike or embankment in front of those which exist at present, that is to say nearer the river than those actually existing ; unless he shall previously have been

authorized thereto by a jury of twelve inhabitants, proprietors of plantations, situated on the banks of the said rivers, convoked for that purpose by the Parish Judge.' "

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" By the 5th section of an act approved March 25th, 1813, 'entitled an act further defining the organization, authority and functions of Police Juries,' (2 Moreau's Dig., 241) the Police Juries of the several parishes, were empowered 'to make all such regulations as they might deem expedient,' as to the proportion and direction, the *making* and repairing of the roads, bridges, causeways, dikes, *levees* and other highways."

" By the 7th section of the same act it is enacted that 'the authority of the Police Jury of the parish of Orleans, shall not extend to the city of New Orleans within the present limits, but it shall be the duty of the corporation of said city to exercise within said limits, the functions committed by law to the Police Juries.' "

" By the first section of an act approved March 14th, 1816, full power is given to the city corporation of New Orleans to pass all ordinances 'to secure the safety and convenience of passing in the streets and squares, ways, *levees and other public roads*, to fix the squaring and to prevent any encroachment or other undertaking on the *said public roads*.' "

" By the law of 1836, dividing the city of New Orleans into three distinct Municipalities, each Municipality is vested with the powers formerly possessed by the city corporation of New Orleans."

" From what precedes, I infer that as long as the erection of a new levee has not been authorized by the proper authority, the old levee remains the bank of the river; what is outside remains the bed of the river."

" But by our law, alluvion, that is to say, accretions which are successively formed, and imperceptibly, to a soil, situated on the shore of a river, belongs to the owner of the soil situated on the edge of the water; La. Code, art. 501. Just as we have seen above, that the banks of rivers belong to the owners of the adjacent lands; that is to say, the *property* of both the

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alluvions (or battures) and of the banks, is in the riparian owner ; but as long as the alluvion is not actually incorporated to the main land of the riparian owner; and that actual incorporation only takes place when a levee or bank separates it from the water ; and as long as the bank actually remains the bank of the river, according to the definition given above, the use of both remains in the public."

"We will have seen above, that corporations of cities and towns have the right to construct in the beds of rivers and on their banks buildings and other works necessary for public utility, for the mooring of vessels and the discharge of their cargoes."

"Upon the whole I consider that the Second Municipality had a right to construct and erect the works in question, complained of by the plaintiffs and that they are not liable to damages for so doing."

The judge, in the conclusion of his charge, told the jury he thought the Municipality had no right to take away the earth from the premises in question, and therefore it was proper for them to enquire into that fact, and should they find it affirmatively, then they would be justified in awarding damages proportionate to the value of the earth so taken. In this we think the learned judge erred.

The use of batture outside of the levee, is vested in the public, but the ownership or title to the soil is vested in the front proprietors of lots, or the land to which the batture attaches or forms.

The corporation or municipality is the administrator of the use of the batture for the public, outside

In the case of the Municipality No. 2 vs. the Cotton Press Company, it was settled, that the use of the banks of the river, and the batture outside of the levee, was vested in the public, but the ownership or title to the soil was vested in the front proprietors ; and they cannot deprive the public of that right of use at their pleasure, or impose any but legal limitations on it. The defendants are the administrators of that use for the general convenience and great objects of public utility, and must necessarily possess all the powers and authority requisite to effect those objects. The article 859 of the Code, we have seen, authorises the construction of buildings and works in the beds of rivers, and on their banks, that "may be necessary for public utility, for the mooring of vessels, and the discharge of their

cargoes." We think, in reference to this article and several others, relating to the uses stated, that they confer plenary powers, and should be liberally construed, when the whole community is to be benefited, and an individual injured no further, than being deprived of such profits, as he supposes he could have made. It may be further remarked, that the expression for mooring of vessels, spreading nets, building cabins, &c., used in the Code, whilst they are permissive for those purposes, are not intended as restrictions of the use to those purposes alone, but as examples, or illustrations of its application. The public is a great usufructuary, the corporation is the administrator, and is not restricted to a mere right of way over the batture or the bank, or to keeping it for the special use of the owner. They have a right to all the profit, utility, and advantages it may produce, and can make works and improvements to increase the revenues.

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of the levee, and have the right of taking earth for the construction of embankments, levees and wharves for the public use on the batture along its whole extent within the corporate limits of the city; and also for improving the port, and the streets and avenues leading to it.

Pulley had no right to go upon the batture and act as he did, without the assent of the corporation; he had no right to appropriate to his exclusive use, that which his fellow citizens were entitled to share with him. He had proceeded, until, to use the language of his counsel, he had made it almost a *private landing*. He was violating the law at the time himself, and has no claim for damages.

It seems a strange doctrine, that earth cannot be used from the batture, to construct works useful to the public, but which so greatly benefit the property inside the levee, which belongs to the riparian owner. Green, who was to give \$320,000 for the square, to which this batture belonged, says, he would not have given much more than half as much, if it had been a few squares distant; and Erwin, when he took Mr. Conrad to look at the property, pending a negotiation to purchase it, pointed out the improvements going on, expatiated on their importance, the facilities and inducements held out to commerce by them, and now we are seriously presented with a claim for the value of the dirt used, in giving nearly a double value to the property

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May, 1841. give our sanction to such a demand.

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We think, the Municipality not only has a right to use the earth, taken from the batture, in the construction of wharves, embankments and levees, but also for improving the port, and the streets, and avenues leading to it.

The judgment of the Parish Court is therefore annulled, avoided and reversed, and ours given for the defendant, with costs in both courts.



CITY COUNCIL OF LAFAYETTE vs. HOLLAND ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The plea of *res judicata* in a petitory action cannot be sustained by the proceedings in a possessory one. A judgment in a possessory action is no bar to an action in revendication, although it be between the same parties, and for the same object.

No particular form or ceremony is necessary in the dedication of land to public use. Lord Ellenborough decided, that when the "owner throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes or prohibits persons from passing through it, he *shall be presumed to have dedicated it to the public.*"

So where the plan of a Faubourg exhibits a front street, called *Levee street*, running parallel with the levee, but leaving a *space* between, on which no specific number of feet are marked, and without any particular designation on the plan, it will be *presumed* to be dedicated to the public use, and required to be kept open and free for this purpose.

This is an action by the City Council of Lafayette, to compel J. H. Holland, G. Depassau, and J. Gleize, to relinquish *all claim* to a strip of ground in *front* of their lots in the city of

Lafayette, lying between Levee street, on which their lots front, and the levee. The City Council claims the administration of this space as a public place, for the use of the public, and require that it be kept open and used as such.

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The defendants pleaded the exception of *res judicata*, founded on two suits, in which these parties had obtained judgments against the corporation in two possessory actions, putting them in possession of this same strip or space of ground. On the merits they pleaded the general issue.

Upon these pleadings and issues the case was tried.

The original plan, when the Nuns laid off their plantation into a faubourg and town lots, in 1810, together with the deeds or acts of sale from the Superieur Nuns to Monsieur J. Deville Degoutin Bellechasse and to Pierre Derbigny, under whom the defendants claim, were produced in evidence.

The principal question to be decided, was whether this *open space*, which appeared on the original plan, *outside* of Levee street, and between it and the levee, was public, by dedication on said plan to and for the *public use*? The defendants claimed it as riparian owners of the lots fronting on Levee street, opposite to the space.

The District Judge decided, that the presumption of an intended dedication was negatived,

1. By the width of the high road or Levee street, marked on the plan, which is 60 feet wide, French measure.

2. By the express declaration of the Nuns in their deeds of sale to the defendants' vendors, that the purchasers of front lots should be seized of the property as riparian proprietors.

3. By the clause in said deeds, reserving to the purchasers of back lots the right of taking earth from the batture.

There was judgment in favor of the defendants, without prejudice to the legal control of the plaintiffs, under their act of incorporation, over the streets, levees, battures and wharves.

The plaintiffs appealed.

McKinney, Preston and Eustis, for the plaintiffs and appellants.

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Strawbridge, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiffs alledge, that by law they have been charged with the care, regulation, control and possession, for the public use, of the streets of the city of Lafayette, and the levee and landing in front thereof. That the lower part of that city was formerly a plantation owned by the Ursuline Nuns, who on the 18th of September, 1810, made a plan of the same, divided into *squares* and streets, which squares they sold in conformity therewith. By the plan, the public road or front street, called Levee street, is stated to be sixty feet, French measure, in width, and the levee and landing extending from said street to the river. The petition further states, that the space between the front street and the water's edge was destined for a levee and landing, and has not been increased by alluvion. The whole of the space was then necessary for those purposes, and absolutely indispensable at this time. It is further stated, that all the space between the street and the river constitutes the bank of the same, and is by law subject to public use, and the corporation are the administrators of that use, and bound to protect and preserve it. It is also stated, that the defendants have taken possession of the space between the street and the river, claim it as their private property, deny the right of the public, and appropriate the ground to their private use, and the petitioners are unable, by their officers to keep said space open, and free for persons to pass, for the landing of produce and merchandize, and reshipping the same, without great inconvenience. They pray, that the use of all the ground between the street and the river be adjudged to be public and common to all persons. That the plaintiffs have the charge and regulation of said use, and that no private and exclusive use thereof is vested in the defendants; and it is further asked, that the latter be forever enjoined from such private use, and from obstructing and impeding the petitioners in the regulation and

control of said space, for the purpose of keeping it free and common for a levee and public landing.

The defendants for answer say, that all the matters in controversy have been adjudged in previous suits, in which judgments are to be found in 7 La. Rep. 1; 9 Idem, 149. They further deny all the matters alleged, and say, they, and those, under whom they claim, have been in peaceable possession of the premises more than thirty years.

The plea of *res judicata* is easily decided. The actions mentioned were possessory in their form and nature, and do not in any manner affect the rights of either party, though the defendants insist on some of the reasons assigned by the court, for the judgments rendered, as sustaining them in their claims. It is well settled, that a judgment in a possessory action is no bar to an action in revendication, although it relates to the same object.

The plaintiffs claim, as being the administrators of a place or space, set apart by the Nuns, when they laid out their land into streets and squares, for public use; or as being subject to a legal servitude, constituting the bank of the river and public road, and liable to be taken to construct a levee on. The defendants claim as owners by direct conveyances from the Ursuline Nuns, through Bellechasse and Pierre Derbigny.

On the 15th of September, in the year 1810, the Ursuline Nuns caused their land, then a rural estate, to be laid out into large lots, of irregular forms, with streets (or chemins, as they are called in the sales), separating them, which are stated in the deeds of sale, as being sixty and forty feet, French measure, in width. On the plan, which was made, the streets are represented and named. In front of the two lots Nos. 5 and 11, and between them and the levee, is laid out a broad street, the width of which is not stated on the plan, but both, plaintiffs and defendants say, it is sixty feet wide, French measure. Lot No. 11 was sold to Derbigny, under whom Holland claims, and is described as having two hundred and seventy-six feet "face a la grande route," which means the street in front; and is

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EASTERN DIS. further described by other distances and streets as bounding it.
May, 1841. The lot No. 5, sold to Bellechasse, under whom Dupassau
CITY COUNCIL OF and Gleize hold, is described as being "*sur la rive gauche du*
LAFAYETTE. *fleuve,*" containing three hundred and ninety-five feet "*face à*
vs. *levee,*" and is further described by a depth of seventeen hundred
HOLLAND ET AL. and fifty-four feet, bounded by various streets. These large
lots have since been subdivided into smaller portions, and are
now held by different persons, though the lots fronting on the
street, belong principally to the defendants.

In each of the sales to Bellechasse and Derbigny, is the following clause: "Les dames venderesses établissent pour clauses et conventions générales et expresses des ventes partielles qu'elles font, tout présentement de leur habitation, que les acquéreurs des trois premiers lots en profondeur à partir du fleuve, seront chargé de l'entretien de la levée et du grand chemin, et jouiront en commun des droits des propriétaires riverains; qu'ils seront néanmoins tenus de laisser prendre sur la batture la terre dont les propriétaires des lots plus éloignés du fleuve pourront avoir besoin pour remblayer leurs terrains, ou pour y bâtir; que les chemins qui séparent les lots, seront entretenus par les propriétaires des terrains devant lesquels ils sont situés." Under these sales the defendants claim to be riparian proprietors. and set up claim to all the ground between their fronts on the street and the edge of the water, except sixty feet French measure for the street, and forty feet for the levee, and say, there is more than sixty French feet between the line of their lots on the street and the levee, which leaves a space between the street and the levee, which belongs to them exclusively; they have it in possession, have had it for a number of years, with occasional interruptions, and have been confirmed in their possession by the two judgments of this court, which they presented to sustain their plea of *res judicata*.

The plaintiffs, by their act of incorporation and other acts of the Legislature, are charged with the control of the streets, levees, battures, wharves and other public places, or places subject to public use, and can exercise such authority in rela-

tion to them, as has been conferred. Acts of 1833, p. 145, sec. 7, 8, 9, 10, 12; Acts of 1830, p. 114 and 115.

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But as the defendants are in possession, it is incumbent on the plaintiffs, to show a dedication to public use of all the ground between the line of the street most distant from the river and the levee. They cannot hold or claim it in any other manner, as it is not pretended, they have a deed or sale. It is well settled, that no particular form or ceremony is necessary in the dedication of land to public use. 6 Peters, 440. Municipality No. 2, vs. the Orleans Cotton Press Company (ante 122).

No particular form or ceremony is necessary in the dedication of land to public use. Lord Ellenborough decided, that when the "owner throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes or prohibits persons from passing through it, he shall be presumed to have dedicated it to the public."

Lord Ellenborough, in the case of Rex vs. Lloyd, held, that if the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public; 1 Campbell, 262. This may be considered by many as going very far, but the facts in this case create a stronger presumption than in that, and we think, make it certain. The Nuns exhibit a plan of their property, upon which a street, called *Levee street*, is exhibited, running parallel with the levee, and according to the defendants' statements, but a few feet from it. No specific number of feet are *marked on the plan*, as exhibiting its width. On each side, close to the front of the lots and to the levee, lines are drawn, which seem to represent side-walks, and the same lines are drawn on all the other streets on the plan. The object of the Nuns, in subdividing their property, was to convert it into town lots, with a view to its becoming an addition to the city of New Orleans, to which it was finally annexed under the name of one of the unincorporated Faubourgs. All the batture outside the levee was made, by deeds, a common property, and every owner of property in the three original lots or squares in depth was a joint riparian proprietor, and even the owners of lots more distant have a right to take earth from the batture, to fill up their lots, and for other purposes. A difference is made as to the persons bound to keep up the levee and street, parallel with

So where the plan of a Faubourg exhibits a front street, called *Levee street*, running parallel with the levee, but leaving a space between, on which no specific number of feet are marked, and without any particular designation on the plan, it will be presumed to be dedicated to the public use, and required to be kept open and free for this purpose.

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it, from those bound to keep up the other streets. There cannot be a doubt, it was the intention of the Nuns, that the batture should be common, if not to the public, to the citizens of the faubourg; the levee was by law public, the street was by dedication and law also public; and it is difficult to believe, it could have been or was the intention of those, granting all these uses and rights, to leave a slip of ground, between the street or public highway and the levee and batture beyond it, which would greatly embarrass, if not entirely deprive both the public and the citizens of the Faubourg, of the enjoyment of the benefits intended to be conferred. As a general rule, the public highways are parallel to or run alongside the levees, adjoining them, and the action of the Legislature is based on that assumption, and in most of our legislative enactments, roads and levees are treated as being in close connection. 1 Moreau's Dig. 650, 655; Acts, 1829, p. 76 et seq. Sec. 9, &c. Martin's Dig. vol. 2, p. 598. We are aware, there are exceptions to the rule, and when they are shown, we shall pay a proper regard to the cases, and regulate our judgments by the circumstances. We have no doubt, there was a full and complete dedication by the Nuns for public use, of all the space in front of the lots or squares Nos. 5 and 11, to the levee, and that the defendants have no title or right, to claim any portion of it, and further, that they are only riparian proprietors in common with the owners of property in the three original lots or squares in depth, as represented on the plan, under which they hold. The plan and the sales to Bellechasse and Derbigny, both passed within a week after the plan was made, show, the whole space was dedicated, notwithstanding the general declaration, of the streets being forty and sixty feet in width. That they were not exactly so, the plan itself shows. St. Mary street, which runs perpendicular to the levee, is represented as forty-five feet wide, and St. Andrew street, next above it, is stated to be forty-three feet in width.

But, say the defendants, this court has decided that the *locus in quo* is not a part of the high road or street, neither does it cover the levee or tow-path; consequently it may be the subject of private ownership; 7 La. Rep., 6; 9 Idem, 153. It is true this court has said so, in two suits between these parties, but in actions essentially different in form and substance; and had this not been said, this case would have been too clear to need much argument to sustain it.

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It therefore becomes necessary to examine the circumstances under which these declarations were made. Each of the present defendants, several years past, instituted actions against an officer of the present plaintiffs for dispossessing them of the space now in dispute. They proved by different individuals, nearly all their tenants or agents, that after allowing sixty feet, French measure, for a street, that a space of about twenty feet would remain between it and the levee, of which the present defendants had had possession for more than a year. The present plaintiffs (then defendants) offered in evidence the plan of the Nun's Faubourg, now before us, and the sale from them to Bellechasse, to show that the property in question was not private property, "but street and levee." To the reception of this evidence, the plaintiffs (now defendants) objected on the ground that their actions were possessory, and titles could not be enquired into. The District Judge, who tried those cases, admitted the evidence and the plaintiffs (now defendants,) took their bills of exception. The evidence was admitted in the District Court to show the place was public and that such a possession as would maintain the action could not be had of it. In this court, the opinion of the District Judge was overruled and the evidence rejected. Judge Matthews, in giving the opinion of the court, says the action "is simply possessory," and the questions whether the defendants (then plaintiffs) be real owners or not, whether the place in dispute be public or appropriated to public use, are questions that depend on an investigation of titles and cannot be permitted in a possessory action; 7 La. Rep., 6.

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One of the present judges, in giving the opinion of the court in the case of Gleisse et al. vs. Winter, &c., says "the question whether it be in fact the property of the plaintiffs, or whether it has been devoted to public use, is in our opinion essentially one of title, and the Code of Practice, art. 53, declares that in possessory actions no testimony shall be admitted except as to the fact of the possession or as to the disturbance, and all testimony relative to property *shall be rejected*." It was under these circumstances, this court declared the *locus in quo* to be susceptible of private ownership; but it is believed such a declaration would not have been made, if the court had not felt compelled to confine its judgment to the simple question of *possession and disturbance*. With all the evidence *then* before the court, *now before us*, together with the plan and sales, we have no hesitation in declaring that all the space in controversy forms a portion of the public road or street and that the defendants have no such title as justifies their appropriating any portion of it to their exclusive use. In addition to the evidence before us, a majority of the members of the court have visited and inspected the premises, which confirms them in the correctness of the conclusions drawn from the evidence.

The judgment of the District Court is therefore annulled, avoided and reversed, and this court proceeding to give such judgment as, in their opinion, ought to have been given in the court below, do order, adjudge and decree, that the plaintiffs recover of and have judgment against the defendants for the space or piece of ground in contest between them, to be held and possessed by the plaintiffs and administered for the public use as a public highway and levee, subject to the laws and regulations relative to public places or places subject to public use. The claim of the defendants to the exclusive use and right to the premises is rejected with costs in both courts.

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The decision of a jury of twelve "inhabitants" or land-holders, under the act of 15th February, 1808, respecting "the police of the shores of rivers," directing the construction of a levee for the protection of a Faubourg, of certain dimensions and fixing its location, is conclusive on the necessity and propriety of the measure, and the city council have the power to cause the execution of the work.

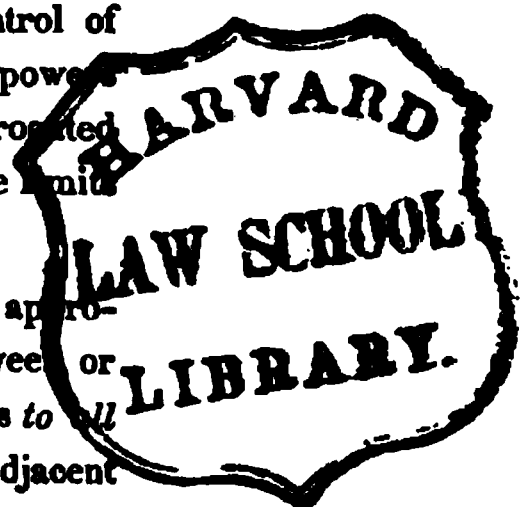
In a controversy about the location of a levee, parol evidence will be received to show *where* the old levee stood, and the new one is proposed to be; and also that the adverse party was trespassing on a *public place*, administered for the public use.

The use of the banks of navigable rivers, is a servitude for the public use, or common utility; and every proprietor adjacent to the shores of a navigable river is bound to leave sufficient space for levees, roads [streets] and other public or common works.

The charter of the city of Lafayette, gives the city council the entire control of the streets, levees, wharves, &c.; confers on the corporation the same powers granted to the city of New Orleans over these objects; and it is subrogated to the powers of the police jury of the parish of Jefferson, within the limits of the city.

No man or individual proprietor of the banks of a navigable river, can appropriate them exclusively to his own use, and at his pleasure construct levees or erect buildings and works that will obstruct the free use of its banks to all men, although the right of property is in him as proprietor of the adjacent lands.

This suit commenced by injunction. The plaintiffs allege they are owners and possessors of houses and lots in the city of Lafayette; having been put in possession by a sworn surveyor, and their lines and boundaries pointed out to them by him, which possession they have held for upwards of fifteen years; and that they have built their houses and made improvements on their lots and within their boundaries respectively, but that the President and Board of Council for said city passed an illegal, arbitrary and oppressive ordinance, ordering the demolition and destruction of their houses, stores and buildings, and directing the municipal officers to carry said ordinance into effect. They further allege that the city surveyor is proceed-



EASTERN DIS. ing to carry the said illegal and oppressive ordinance into effect,
May, 1841. by which they will be greatly damaged and injured by the de-
HANSON ET AL. struction of their buildings, improvements and other property,
vs. and deprived of the possession of their lots, &c. The peti-
CITY COUNCIL OF tioners then set out, each one his respective house and lot by
LAFAYETTE. a particular description and specification, and the whole con-
clude with a prayer for an injunction to restrain and prohibit
the proceedings of the City Council; and that the injunction
when granted, be made perpetual by a judgment of the court,
and that the city of Lafayette be condemned to pay them 10,000
dollars damages.

The defendants pleaded a general denial; and expressly averred that they possessed the power to make all necessary and needful regulations respecting streets, levees, roads, ditches, bridges, &c.; and to repair old levees, and lay out and construct new ones, and fully empowered and authorized by law to take such steps and use the means necessary for the accomplishment of said objects and purposes. They pray that the injunction be dissolved with damages.

Upon these pleadings and issues the case was tried before the court.

On the trial, the plaintiffs showed they had been in the undisturbed possession of their respective lots and houses, and in the occupation of their stores for a great length of time over a year, and they urged that as they stood in the relation of possessors towards the corporation that they could not be disturbed or ousted in a proceeding which their counsel contended was in the nature of a possessory action.

The City Council, however claimed to exercise the powers and duties conferred by law on the police juries in the several parishes, and particularly the police jury of the parish of Jefferson, which was clothed with extensive powers in relation to making, repairing and keeping up the levees within the limits of the parish.

The evidence showed that the plaintiffs in injunction had established themselves on lots and erected brick buildings for

dwellings and stores with other improvements thereon, *outside* of the front street or highway, and between it and the water ; and that in some places they were on the site of the old levee and between it and the river. The river had made encroachments or abrasions on the bank opposite or in front, and the water at high winds and tides beat over the levee in places ; thereby endangering the inhabitants by an overflow.

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The City Council passed an ordinance ordering a new levee to be made, and directed their surveyor to mark out and make a plan of it. He did so ; projecting one with a base of sixty feet, which was approved by a jury of land-holders. The city authorities were proceeding under this ordinance, so much complained of by the plaintiffs, to take down several of these houses and clear the bank of the river. The new levee covered the ground, and was required to be made over the lots and space of ground where the buildings and improvements, about to be demolished, had been erected. The evidence showed the absolute necessity of placing the levee here to preserve the city and country from an overflow.

The plaintiffs contested the right and power of the City Council to make the levee and place it where they thought proper ; and further contended that they must be indemnified for their property taken or destroyed in the establishment of the new levee.

Notwithstanding this suit commenced by an injunction prohibiting the City Council from proceeding in their work of constructing a new levee, deemed necessary for the safety of the inhabitants and their property, and the issue involved the question of the right of the corporation to demolish the buildings and improvements of the plaintiffs in order to clear the banks of the river and to place a new levee thereon, yet the parties seem to have viewed the case in the light of a *possessory action* : for among the evidence at page 18 of the record the following agreement appears :

“ It is agreed that every thing but the question of *possession* be reserved.”

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The record contains a mass of testimony taken to the whole case, embracing every thing connected with the subject, except as to the actual value of the buildings to be pulled down and property taken for the new levee. The description and position of the buildings and plans of levee, street, road, banks of the river, &c., were produced in evidence.

The District judge considered the case as a possessory action; that he had no middle course to pursue, but either to perpetuate or dissolve the injunction. He however considered further that the property of the plaintiffs could not be taken from them for the new levee and works contemplated by the City Council *without compensation*, which should be paid or tendered before expropriation; La. Code, arts. 2604, 2606, 2607.

There was judgment perpetuating the injunction and the defendants appealed.

Roselius, Pierce & Latour, for the plaintiffs.

Eustis, & M^cKinney, for the defendants, made the following points in argument:

1. The law considers the banks of rivers merely in relation to position and not in reference to occupation or ownership.

2. The right of use in the banks of rivers is a matter of public administration which the State exercises by delegation to different municipal bodies. The exercise of this power is not simply a matter of municipal administration but a portion of the sovereign authority.

3. On the borders of the Mississippi the levees form the banks; La. Code, art. 448. The use is in the public; *Idem*, 446.

4. The use of the banks of rivers is a servitude imposed for public utility—every thing in relation to it is determined by laws or particular regulations; *Idem*, 660, 661.

5. The law does not determine by an uniform rule the extent of the levees or the space on the bank required for the public

use. This is a matter of *regulation* and must depend upon the various localities, soil and currents of rivers in different parts of the State.

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6. The power of regulating the extent of this servitude, which changes with the changes of rivers, is vested in the police juries; 1 Moreau's Digest, 651, verbo levees.

7. All lands on the borders of rivers are held subordinate to this right, which is a servitude, and the exercise of it is not an expropriation or a trespass, but a vindication of a public paramount right; Macarel, lib. 9, p. 373; 5 La. Rep., 422; 3 Idem, 567; act of 1830 concerning levees; act of April, 1833; vide 3 Kent's Commentaries, 424.

8. The powers and authority of police juries relating to levees are vested by law in the defendants; act of 12th March, 1836, sec. 9; acts incorporating the city of Lafayette.

9. Whenever a right of property to the exclusion of the public use is set up by any riparian proprietor, or whenever an exemption is set up in derogation of this general servitude, a title to that effect must be shown from the sovereign, and no possession will avail against it, unless such possession be immemorial; 3 Martin, N. S., 298 et seq.; Novissima Recop., lib. 11, tit. 8, law 4.

10. It is incumbent on the plaintiffs affirmatively to show their title to the exemption they claim, and it is not by virtue of a mere occupancy that any impediment to the public right can be created.

11. In a case like this, a court will not interfere by injunction to prevent the execution of a public work, which the proper authority has determined to be necessary, and which the public safety requires should be executed without delay or obstruction.

12. The different bills of exception not having been called before the court in argument by the counsel, may be considered as abandoned, or as merged in the principles embraced by the argument of the case.

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Garland, J. delivered the opinion of the court.

The plaintiffs allege they are the owners and proprietors of certain lots of ground, with the improvements and buildings thereon, situated in the city of Lafayette, and have been in quiet possession thereof for upwards of fifteen years. That before they erected the stores and buildings on their lots they called on a sworn surveyor of the State, there being then none in the parish of Jefferson, to show them their lines and boundaries on which to build. They further represent, that the City Council of Lafayette have passed an arbitrary and oppressive ordinance or ordinances, directing the municipal officers to forcibly enter, turn them or their tenants out of their stores and houses, and that Benjamin Buisson, surveyor of the said city, and other persons are about to execute the order or orders, whereby they will be irreparably injured, and a pecuniary loss of more than \$300,000 will be sustained. The petition then proceeds to the description of each lot of ground, naming the person to whom it belongs: Which lots are all in what are generally called the suburbs Lafayette and Livaudais, fronting on Levee street and running from it across the levee and batture outside of it, to the low water mark, all of which will appear from their titles and plans.

They further allege they have requested the City Council and their officers to desist from their illegal acts, but they persist in their determination to pull down the houses and take the ground; wherefore they pray they may be enjoined from destroying their property and disturbing them in the possession and enjoyment of it, which injunction they pray may be made perpetual and ten thousand dollars damages be allowed them.

To this petition and injunction the defendants answered by a general denial, and an averment that the City Council have power by law to make all necessary rules and regulations respecting the streets, roads, ditches, bridges and highways; also to repair old levees and construct new ones when necessary, and have authority to take such measures as may be proper to

effect those objects. They pray a dissolution of the injunction and for twenty thousand dollars damages.

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The evidence shows, that the plaintiffs have acts of sales, and are possessors of the lots and buildings mentioned in their petition, for different periods. Some for two years, others for fourteen or fifteen years, and others for shorter periods. It is also shown, that the President of the Council had notices served on him, requiring, that within thirty days they remove all the incumbrances, obstructions and buildings on the line of the levee, ordained by the Council, in front of and through their property, according to the plan made by the City Surveyor, who was ordered to show them the lines, when called on; and it is also shown, that a number of houses were demolished, and those belonging to the plaintiffs threatened with demolition. Buckman, a witness for the plaintiffs, after stating various facts, confirming the previous statements of other witnesses in relation to their possession and rights, says, the banks of the river have been gradually washing away, in consequence of the action of the water, produced by the steamboats passing near the shore, but the condition of the levee has generally been good until the previous high stage of water, when it ran over in several places. The evidence on the part of the defendants shows, that on the 18th of June, 1840, the Committee of the Council on Streets and Landings, reported to that body, they had inspected the levee in front of the city, and find it in a precarious and weak condition on its whole line, but very much so in front of the faubourg Lafayette. That it has been broken down by being travelled on by drays, carts and other vehicles, and in many places the water flows over it. After a thorough examination, the Committee say, the safety of the cities of Lafayette and New Orleans requires a new and more substantial levee should be constructed as soon as practicable. Upon the presentment of this report, the President of the Council was authorized to summon the legal number of freeholders, to examine and inspect the old levee, and report, whether a new one was necessary. Twelve freeholders were summoned, among whom were

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EASTERN DIS. Hanson and McGarey, two of the plaintiffs. This jury met,
May, 1841. and on the 2d of July, 1840, unanimously reported, that a new
HANSON ET AL. levee was necessary, and required along the whole front of the
VS. city. They say it can be immediately commenced in front of
CITY COUNCIL OF the Nuns' Faubourg, but advise a postponement as to fixing the
LAFAYETTE. line in front of the Faubourgs Lafayette and Livaudais until
 August, when the water shall be lower, and it can be better de-
 signated. On the presentation of this report, the City Surveyor
 was directed to make a plan and specifications of the levee in
 front of the Nuns' Faubourg, and means were adopted to com-
 mence it forthwith. On the 6th of August, 1840, the jury again
 met for the purpose of designating the line of the levee in front
 of the Faubourgs Lafayette and Livaudais. After inspection,
 they were still unanimous as to the necessity of the new levee,
 and ten of the jurors concurred in the line, its base to be sixty
 feet in width "from the break of the bank of the river,"
 wherever that distance can be obtained without encroaching on
 the street. The levee to be run in a straight line on each
 square, commencing at St. Andrew street, where it was to
 connect with the levee in front of the Nuns' Faubourg, and ex-
 tend to the upper limit of the city. To this report, Messrs.
 Hanson and McGarey dissented, on the ground, that sixty feet
 base was more than necessary. They thought, forty feet were
 sufficient, to be measured from low water mark, extending to
 the top of the bank, and they say, a levee so placed will be suf-
 ficiently durable and substantial. We cannot forbear remark-
 ing here, that Messrs. Hanson and McGarey, when the levee
 was to be made in front of the Nuns' Faubourg, did not think
 sixty feet base too much, but in front of the Faubourg Lafayette,
 where, according to the evidence, the levee was worse than any
 where else, forty feet were sufficient, and they were to be taken
 from low water mark, on a bank gradually wearing away by
 the abrasion of the river. What influence their interests had
 upon their judgments, it is not necessary now to decide. The
 Council directed the levee to be made in conformity with the
 recommendation of the majority of the jury, and shortly after

commenced the work; the President and Surveyor being vested with the necessary authority to remove obstructions and incumbrances. To arrest the Council in the execution of this ordinance, is the purpose of this injunction.

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From the plans of the Faubourgs Lafayette and Livaudais, it appears, that in both of them the public road or Levee street is laid off some distance from the edge of the bank of the river or the existing levee, and on each side of it a range of lots is laid out; those on the side next to the river running across the levee to low water mark, measuring in some instances more than two hundred feet. On many of those lots, the buildings instead of being erected on the street, are on the end next to the bank of the river, close to the water's edge, having a levee or embankment of an irregular height and base to protect them. Not one of the plaintiffs have left more than thirty-five feet between their houses and high water, and some of them only fifteen feet and a few inches, others eighteen, twenty and twenty-five feet. Each one seems to have built very much at his own will, both before and since the incorporation of the city. The old levee has been cut down and destroyed, that buildings might be erected on its site, and every house now sought to be demolished, is in the whole or in part on the former levee, or entirely outside of it. The witnesses all testify to the inadequacy of the present protection from inundation. It is said, that the water has run over the embankment in various places, that steamboats in passing, throw it over, and that the banks are falling in at different places. Buisson, the surveyor, says, that the projected levee is on or very nearly on the site of the old one, and in some places nearer the river. That in a few places, the inside of the levee will be something more than sixty feet, in consequence of the irregular caving in of the bank.

About thirteen persons, owning about twenty lots, oppose the execution of this work, which all the other property owners appear to favor, and the question is, shall their will and interests prevail over that of the mass of the property

EASTERN DIS. owners in that quarter and the safety of the whole community?
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In the course of the trial, the plaintiffs took a bill of exception, to the opinion of the court overruling a question propounded to the witness Bach, asking his opinion "concerning the existence, extent and sufficiency of the old levee in comparison with the projected one." The defendants objected on the ground, that the "discretion of the President and City Council of the city of Lafayette could not be inquired into by the courts." The court sustained the objection on two grounds. First, that the question involved an inquiry into the propriety, expediency and necessity of the projected change in the levee, which the Judge considered to be a matter within the discretion of the defendants, and that discretion could not be revised by him. Secondly, that the only matter for the court to consider, was the expropriation of the property, and whether the defendants had kept within the limits of their charter in making the expropriation. We think, the Judge was right in rejecting the evidence, but not for either of the reasons he gives for his opinion. The action of the plaintiffs, it appears to us, is an injunction to prevent a trespass and disturbance of an alleged possession, by the officers of the Corporation, under an ordinance regularly enacted, the expediency of which is not denied; its illegal and oppressive character as to the plaintiffs is only alleged; and as it appears, the Corporation proceeded to summon a jury, to decide on the expediency and necessity of making the levee, under the act of 15th of February, 1808; 1 Moreau's Dig., p. 651; and that jury having decided in favor of it, we think their decision conclusive, as to the necessity, unless the nullity or illegality of their proceedings are put in issue, which has not been done.

The decision of a jury of twelve "inhabitants" or landholders, under the act of 15th February, 1808, respecting "the police of the shores of rivers," directing the construction of a levee for the protection of a Faubourg of certain dimensions, and fixing its location, is conclusive on the necessity and propriety of the measure, and the city council have the power to cause the execution of the work.

The plaintiffs' second bill of exception, we think, cannot be sustained, for the reasons stated in relation to the first; the object of the testimony offered being in effect the same.

The third bill of exception is more untenable, than either of the others, as we cannot possibly see, what the amount of

monies received by the Harbor Master, or what has been expended by the defendants on the public road and levee, has to do with this controversy. It is irrelevant to the issues joined.

As to the fourth bill of exception, we think, the Judge did not err in admitting Buisson's testimony, and the plan he presented. The object was, to show where the old levee was, and thereby show, that the plaintiffs were themselves trespassing on a place, the public had the use of, and of which the defendants were the administrators, and had the control. If on no other account, the evidence was admissible on the question of damages.

The use of the banks of navigable rivers is by law public, and on the Mississippi the levees are the banks; La. Code, arts. 446, 448. This is a servitude, established for the public or common utility, and all that relates to it, is regulated by particular laws; and every proprietor, adjacent to the shores of a navigable river, is bound to leave sufficient space for the making or repairing levees, roads and other public or common works. Idem, arts. 660 and 661. The principles here laid down, have been long well established, even if positive legislation had not sanctioned them.

The subject of roads and levees has repeatedly occupied the attention of the Legislature, and in relation to both, many positive regulations have been made of a general and local character. No subject is more important.

The act of February 15, 1808, Moreau's Dig., vol. 1st, p. 651, which forbids any one making new levees, without the authorisation of a jury of freeholders, and imposes penalties for constructing works which shall hinder or obstruct the free use of the shores of the Mississippi, seems not to have excited much of the attention of the District Judge or the Counsel. The act of the 18th of March, 1816, 2 Martin's Dig., 594, (which by some strange omission is not in Moreau's Digest at all,) and that of the 7th of February, 1829, session acts, p. 76, appears also to have escaped attention. These two laws, portions of

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In a controversy about the location of a levee, parol evidence will be received to show where the old levee stood, and the new one is proposed to be; and also that the adverse party was trespassing on a public place, administered for the public use.

The use of the banks of navigable rivers, is a servitude for the public use, or common utility; and every proprietor adjacent to the shores of a navigable river is bound to leave sufficient space for levees, roads (streets) and other public or common works.

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the first of which are re-enacted in the latter, are full and specific in relation to levees. The base and height are ordained. The 3d section of both laws directs, how far the levee shall be from the water's edge. In some situations it must be an arpent at least, and in all cases at least sixty feet, measuring "from the summit of the bank." Section 5 says, that the earth used in the construction or repair of a levee, shall be taken at least twenty feet from the base, on the side of the river. Every proprietor of land fronting on the river, is bound, at certain seasons to keep a certain number of slaves to work upon the levee and keep it in repair. By the act of the 30th of January, 1834, sec. 4, the police jury of the Parish of Jefferson, independent of the general legislation on the subject, had special powers delegated to them in relation to the proportion, direction, making and repairing of levees, dykes, &c., and among them expressly the power of pulling down and removing all buildings and other incumbrances, that may obstruct the levee or space between the levee and river.

The charter of the city of Lafayette confers on them the entire control of the streets, levees, wharves, &c., subject to the restriction, that they shall not pass any ordinance, which shall interfere with the rights of the public to the levee, bank of the river or batture. Acts of 1833, p. 146, sec. 10. The 12th section of the same act confers on the Corporation all the powers, granted to the Mayor and City Council of New Orleans, by the "act concerning levees," passed March 16th, 1830: Acts of 1830, p. 114. The powers granted by this act are very great, and authorise the demolition and removal of obstructions, at the expense of those who have erected them. By the act of March 12, 1836, session acts, p. 131, sec. 1, the City Council are specially subrogated to all the powers of the police jury of the Parish of Jefferson, within the limits of the city, and the 9th section of the same act again confers on them the power, to prevent the obstruction of the streets and levees. If further power was necessary, it is given by the article 857 of the La. Code, which authorises the destruction of any works built on

The charter of the city of Lafayette, gives the city council the entire control of the streets, levees, wharves, &c.; confers on the corporation the same powers granted to the city of New Orleans over these objects; and it is subrogated to the powers of the police jury of the parish of Jefferson, within the limits of the city.

the banks of rivers, at the expense of those who claim them, and the owner of those works cannot prevent their being destroyed under any pretext of prescription or possession, even if immemorial.

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This court has heretofore had occasion to act upon this question in the case of the Trustees of Natchitoches vs. Coe, 3 Martin, N. S., 140; and directed the removal of a house that had been built on the bank of Red river, which interrupted the use of its banks, which are common to all men.

No man or individual proprietor of the banks of a navigable river, can appropriate them exclusively to his own use, and at his pleasure construct levees, or erect buildings and works that will obstruct the free use of its banks to all men, although the right of property is in him as proprietor of the adjacent lands.

If there be one provision of law clearer than any other, it is, that no man has a right to take exclusive possession of the banks of a navigable river, and appropriate them to his own use, and particularly of the banks of the Mississippi. He has no right to extend levees at his will and pleasure, or erect buildings and works, that will obstruct the free use of the banks to all men, although the right of property is in him, as proprietor of the adjacent lands.

The acts of 1816 and 1829, before referred to, having fixed sixty feet as the minimum distance, at which a levee shall be placed from the summit of the bank, we cannot see in the proceedings of the City Council any of that arbitrary and oppressive spirit, so freely imputed to them. Although we do not hold them as a petty sovereignty, free from control, and making their discretion the law, yet we think, they are charged with important public interests, and they who complain of them, ought to present themselves as citizens, willing to comply with the laws, and showing a proper regard for the rights of their fellow-citizens.

The plaintiffs strongly insist upon a compensation in damages in the event of their buildings being destroyed and the ground taken to make a levee, and say, they have been led into error by the ordinance of the City Council of the 18th June, 1833, reserving only forty feet for a landing and tow-path, and the proceedings of the police jury of the Parish of Jefferson. We think the character of that ordinance is not properly understood. The Council say nothing about the construction of a

EASTERN DIS. levee, and although all was not reserved, to which they were
May, 1841. entitled, it does not follow, that their rights were abandoned.

HANSON ET AL. But even if they had fixed forty feet as the space to be left, the
vs. plaintiffs have not respected the ordinance ; the evidence showing, that not one of them has left that space ; several of them
CITY COUNCIL OF are within twenty feet of the summit of the bank. The plain-
LAFAYETTE. tiffs appear to have built their houses on the levee or outside of it ; by doing so, they became themselves violators of law and of public rights, and must take the consequences of their own acts. The laws prohibiting the erection of buildings and works on the banks of navigable rivers, have been long enacted, and were in force before the plaintiffs made their establishments and purchases. We therefore think, they are not entitled to damages ; and if they were, it would not be just the Corporation of Lafayette should pay the full amount of them, as the space sought to be opened, and the levee to be constructed, is for the public benefit, and not exclusively for that of the inhabitants of that city.

The District Judge has, in our opinion, mistaken the character of this action ; it is not possessory, exclusively. Whilst we concur in many of the principles he has stated, and the reasons given, we cannot concur in the conclusion drawn from them. The judge thinks, because he could not allow the defendants all they claim, that therefore he could not allow them any thing. We do not consider ourselves so closely restricted.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and this court proceeding to give such judgment, as in its opinion ought to have been given by the court below ; do further order and decree, that the injunction issued herein, be dissolved, and the plaintiffs' action dismissed ; they paying the costs of this appeal, and those in the District Court.

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ON AN APPLICATION FOR A RE-HEARING.

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A re-hearing allowed on the question of damages, respecting the *right* of the plaintiffs, as front proprietors, to be paid for the property taken or destroyed in making the new levee.

Roselius & L. Pierce, on the part of the plaintiffs, solicited a re-hearing in this case. They insisted on it because the court had decided the whole case, when it was only tried in part in the court below; and the question decided by that court could alone be appealed from. The question of damages was by consent of parties reserved until the right of the defendants to make the levee should be first decided. It is true the court rejects the claim for damages, but in doing so, it assumed original jurisdiction, and acted on a matter not before it. We certainly have a right to be heard upon this subject before we are condemned; for even admitting that the plaintiffs have no right to the exclusive use and ownership of their property, yet it is not so very clear that the houses which they have built on the faith of the proceedings of the Police Jury, can be demolished over their heads without indemnity; nor is it so very plain that the municipal corporation having by its ordinance of the 5th June, 1833, induced the plaintiffs to believe that only forty feet fronting the river and parallel with it, was required for the use of the public, *is not* responsible for the damages thus occasioned. At all events we take it that these are questions of sufficient importance to the parties to afford them an opportunity of being heard in support of what they may conceive to be their rights. The agreement and reservation is found at page 18 of the record.

2. In deciding the merits of this case, we humbly conceive the court has fallen into an error of fact. Had the plaintiffs' counsel entertained the most distant idea that their clients were trespassers on the public domain, they never would have instituted this suit. That formerly the levee was further from the river, than that which now exists, is not denied, but that the

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present levee in front of the plaintiffs' property had existed and been kept in repair for the last fifteen years, under police regulations and the ordinances of the City Council is established by the evidence. One witness says that in 1836 the repairing of the levee in front of plaintiffs' property was adjudicated to him, under an ordinance of the City Council of Lafayette. The plan of the city of Lafayette was made in 1824, and the plaintiffs' property is represented thereon with the levee in front of it. Another witness declares that the streets ran through the former levee in 1827. The plan of Livaudais was made in 1832; submitted to the Police Jury and approved by that body, who also approved of the levee in front of the plaintiffs' buildings. This is confirmed by the testimony of the city surveyor. With what truth it can be asserted, with these incontrovertible facts before us, "*that the plaintiffs appear to have built their houses on the levee or outside of it; by doing so they became violators of the law and of public rights, and must take the consequences of their own deeds,*" we confess ourselves unable to conceive. It is true, if the gossiping of some of the witnesses is alone considered, there may be some foundation for the assertion. But when we look to the acts of the defendants themselves, we are led to a different conclusion. The present levee was established by the original founders of the city of Lafayette and Faubourg Livaudais, and was approved of by the Police Jury. The Municipal Council has constantly recognized its existence by keeping it up and repairing it since the incorporation of the city. In the spring of 1840, owing to the extraordinary and unprecedented rise of the river, the Council determined to make a new levee; considering that the old one was insufficient. This in itself is an admission on their part that an old levee existed.

The counsel then go into a critical examination of the location of the new levee, the position and situation of the plaintiffs' property, and the legality of the ordinances and proceedings of the City Council. They conclude with the expression of their belief that the court acted under the erroneous impression that the

plaintiffs' property was burthened with a servitude in favor of the public and could be taken and used for the purposes intended by the city authorities of Lafayette. The question is a grave and important one; it is whether the private property of the plaintiffs shall be taken for public purposes, without indemnity? They respectfully submit the question for a re-hearing to the court.

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Garland, J. delivered the opinion of the court.

The court refuse to grant a re-hearing upon all the points set forth in the petition of the plaintiffs except one.

When the case was before us, it was elaborately argued as to the power to demolish the buildings on the levee and bank of the river, and as to the question whether it could be done without paying damages. Various articles of the Code were referred to, and a long argument followed to prove the plaintiffs were entitled to damages in consequence of the ordinance of June 5th, 1833, entitled "an ordinance relative to the public levee." It was never once intimated that the whole case was not before the court, and had we been of opinion that the plaintiffs were entitled to damages and remanded the cause to have them ascertained, it is probable we should not have heard of this ground for a re-hearing. After an opinion has been drawn from the court by arguing points not before it, we are then told by the party presenting those points, the case "was only tried in part in the court below, and the question decided by that court was and could alone be appealed from. The question of damages was by consent of parties reserved until the right of the defendants to make the levee should be first decided." The court is then charged with assuming original jurisdiction and acting upon a matter not before it, and we are referred to an agreement contained in about a line and a half, copied into the record at the end of the evidence of a witness who had been under examination, and appearing more as a part of his statement than an agreement of parties or coun-

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sel, which says, "*It is agreed that every thing but the question of possession be reserved.*" The index does not show any such agreement existed, and the counsel on neither side noticed it. It was, in the examination of a voluminous record, overlooked, and the plaintiffs now claim the benefit of it. We shall not withhold from them any point on which they are entitled to be heard, but the circumstances of this case will induce us in future, to look more closely to the course of practice pursued by the counsel for the plaintiffs.

A re-hearing is therefore allowed upon the question of damages; and our entertaining the action is confined to that point alone. This delay or application is not to prevent the execution of the ordinance of the City Council of the city of Lafayette relative to the construction of the levee, which was enjoined.

LEREY vs. MUNICIPALITY No. 3.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

A contract entered into by the city of New Orleans before its division into Municipalities, must be enforced against the whole city or the commissioners of the sinking fund representing it; and not against any one of the municipalities separately, although the works performed may have inured to its particular benefit.

This is a suit to recover from the Third Municipality the amount of an account (\$498) for putting up small planks at the corner of each street in said municipality, with the name of the street thereon in large letters, at the rate of one dollar for each plank.

The Municipality refused to pay the account, although its officer certified that the work had been done.

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The evidence showed that one Baral entered into a written contract in 1835, before the division of the city into municipalities with the Mayor of the city, to place these sign or letter boards at the corner of the streets for the whole city. He performed part of the work and transferred the balance of his contract to the plaintiff, who has performed and finished it in good faith.

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The sole question is who shall pay this account? The Third Municipality within whose limits it was performed and has reaped the benefits; or the whole city who undertook the work and with whom the contract was made?

There was judgment for the plaintiff and the defendants appealed.

Bodin, for the plaintiff.

Preaux, for defendants.

Simon, J. delivered the opinion of the court.

Before the division of the city of New Orleans, and in pursuance of an ordinance of the former corporation, a notarial contract was passed between the Mayor of the city and Baral & Co., for the purpose of executing certain works described in the said contract; among which was the making and posting up of the names of the streets throughout the city, at the rate of one dollar for each plank. Baral had partly executed his contract, when in August, 1837, he transferred the balance of the same to the plaintiff, who having been thereby subrogated to all the obligations and rights stipulated by Baral, assumed said contract, and completed the works therein provided for, by painting and posting up the names of all the streets of the third municipality. Plaintiff now sues for the recovery of the amount of his account.

Defendants aver that they never made any contract with the

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plaintiff or with Baral & Co.; that by the law of the division of the city, the commissioners of the sinking fund are obliged to pay the debts of the ancient corporation; that the debt sued for is a debt of the said ancient corporation, and must be paid by the general sinking fund, and that the plaintiff has no right of action against the third municipality. There was judgment in the lower court in favor of the plaintiff and the defendants appealed.

The evidence shows that the work was performed by plaintiff according to the original contract; his account is correct and has been satisfactorily proven; and the only question now submitted to our consideration is whether this is a debt of the former corporation, to be paid out of the sinking fund?

It is perfectly clear that according to the 15th section of an act of the legislature, entitled "an act to amend the act entitled 'an act to incorporate the city of New Orleans,' approved February 17th, 1805, and other acts amending the same," approved on the 8th of March, 1836, the payment of the general debts due by the ancient corporation, has been provided for by the establishing of a general sinking fund, to be administered as pointed out in the said act; but as to what is to constitute a debt of the former corporation, the law is entirely silent. In this case, the work for which the plaintiff seeks to be remunerated, had been ordered by the ancient corporation, and accordingly a contract had been passed between the Mayor and the undertaker. At the time the city was divided into three municipalities, a part of the contract had been executed, and there remained only to be performed that part of the said contract relative to the posting up of the names of the streets of the third municipality. We may fairly presume that Baral & Co., had been fully compensated for the work they had done under their contract, when they transferred the balance thereof to the plaintiff; and there is no evidence before us that said work already performed was paid for by any of the municipalities for the respective benefit of which the same had been done. Under said contract, the undertaker could only look to the an-

A contract entered into by the city of New Orleans before its division into municipalities, must be enforced against the whole city or the commissioners of the sinking fund representing it; and not against any one of the municipalities separately, although the works performed may have inured to its particular benefit.

cient corporation for his payment, and when the plaintiff undertook to complete it, and consented to be subrogated to the obligations and rights arising from the contract, he was aware that the third municipality was not a party thereto, had never assumed the payment of the sums therein specified, and that as it was nothing but the continuation of an undertaking which originally concerned the whole city in general, it mattered not what part of the same he had to perform.

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But it is insisted that the defendants have alone profited by the work performed by the plaintiff; that the same was executed since the division, and that the third municipality having ordered its own officers to examine and approve of the work, thereby took the contract for itself, &c. This last circumstance does not appear to us sufficient to operate any change in the parties to the original contract, nor in the obligations resulting therefrom; the plaintiff took the contract as he found it; and if he afterwards thought proper to submit his work to the officers of the municipality within the limits of which it had been performed, this cannot give him any right to apply for his payment to a corporation that had originally no control over his obligations; moreover, there is no evidence that the inspector of public works of the third municipality ever acted by virtue of any order or ordinance of the corporation.

It is true that the defendants have been benefited from the performance of the contract by the plaintiff, and that the work was done since the division; but, as we have already said, the contract was originally made for the benefit of the whole city; its object was of a general character; and it would, in our opinion, be unjust to make the defendants exclusively liable to support the whole of the expenses incurred, under said contract, within the limits of their newly established corporation, whilst the other parts of the city, have had the benefit of the same kind of work under the same contract, the payment of which must have been discharged out of the general funds of the ancient corporation. We see no reason why the defendants should not have the same advantage, and why the

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amount sued for should not be considered as one of those debts of the former corporation which are to be satisfied out of the general sinking fund as provided for by the 15th section of the said act of assembly.

The plaintiff mistook his remedy.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and that our judgment be for the defendants against the plaintiff with costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it is clear, a cause is not in a proper *condition* to decide on the important and delicate question involved, and the justice of the case requires it, it will be *remanded* for a new trial, rather than a judgment of non-suit entered.

This is an action by Ann M. Morehouse, wife of J. M. Patton; of Lucretia C. Morehouse, wife of Joseph Pilcher, of Nashville, Tennessee; and of R. H. Sterling, of Mississippi, in behalf of his minor children, in right of their deceased mother, Eliza Cornelia Morehouse, who claim to be *the only legitimate heirs* of Col. Abraham Morehouse, deceased, who died in the Parish of Ouachita, in the year 1813.

The plaintiffs allege, that their ancestor was owner by purchase of four-tenths of a concession or grant of land, 12 leagues square, in the Parish of Ouachita, made to the Baron de Bastrop by Carondelet, then governor of Louisiana, in June, 1796. That in 1807, Edward Livingston having become the

owner by purchase of a judgment, &c., of the other six-tenths of said grant of land, a partition was made between him and their ancestor. The plaintiffs further show, that the late Stephen Girard, of Philadelphia, accepted *transfers* from persons pretending to be heirs of the said A. Morehouse, deceased, to the amount of 208,000 acres of said grant; that the said Girard, by his last will and Testament, opened in 1830, made a bequest of one undivided third part of said 208,000 acres to the City or Corporation of New Orleans, and to the Corporation of the city of Philadelphia of the remaining two-thirds of said portion of land. That these two Corporations set up title to said land by virtue of said bequest; and that their claims are greatly injurious to the rights and claims of the petitioners, who are the sole and legal owners thereof. They pray, that a *curator ad hoc* be appointed to represent the city of Philadelphia, and that they have judgment against both Corporations, decreeing them to be the only legal and legitimate heirs of Col. Abraham Morehouse, deceased, and entitled to all the title, right and interest, he ever had in and to said land, as described herein.

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The two Corporations severed in their answers, but averred, that they hold said land by good and sufficient titles; and also by prescription. They expressly deny, that the plaintiffs have any title, or are in any manner entitled to said land; or that they *are the legal heirs* of said Abraham Morehouse, deceased, as they allege themselves to be; and generally, the defendants deny all the allegations of the plaintiffs.

Upon these pleadings and issues the parties went to trial.

The contest turned principally on the heirship of the plaintiffs. The evidence showed, that Col. Abraham Morehouse was married in New York in 1790, to Abigail Young, with whom he lived and cohabited four or five years, and had two sons, Andrew and George Morehouse. In September, 1799, having abandoned his family in New York, for Louisiana, Col. Morehouse entered into a marriage contract with Eleanor Hook, before the Commandant of the District of Ouachita, (his

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first wife still living,) in which he obliged himself to cause the marriage to be solemnized anew in a church on the first occasion that offered and as soon as possible, and whenever one of the parties should require it. From this marriage connexion the plaintiffs sprung; the parties living together and cohabiting as man and wife, until the death of Col. Morehouse, in 1813.

The evidence further disclosed, that about two years after the execution of the marriage contract before the Commandant, a priest came along and offered to celebrate the marriage according to the forms of the church, and Col. Morehouse refused; declaring, he had a wife living in New York. On this disclosure, they were both ordered out of the country, until the change of government. The defendants claim under conveyances from the heirs, born of the first marriage. There was a judgment of non-suit, and the plaintiffs appealed.

Preston, for the plaintiffs and appellants.

Strawbridge and Canon, for the defendants.

Simon, J. delivered the opinion of the court.

This is a petitory action, in which the plaintiffs represent themselves to be the only lawful heirs of Abraham Morehouse, deceased, under whom they claim. The defendants set up good and sufficient titles to the property in dispute, which, they say, they have also acquired by prescription; and denying all the allegations contained in the plaintiffs' petition, they put the plaintiffs to the strict proof thereof.

It is material and necessary to remark, that one of the special allegations set forth in the petition, is, that the petitioners being the only heirs and representatives of Abraham Morehouse, deceased, no other persons pretending to be such, were in reality his heirs, and that the petitioners have never sold or otherwise disposed of their rights. This allegation necessarily puts at issue the right of the plaintiffs, to inherit from the deceased to the exclusion of all others, and to set up a claim to any part of his estate; and as the defendants have shown, in establishing

their title to the land sued for, that it is derived from persons styling themselves to be the widow and heirs of Abraham Morehouse, deceased, there results therefrom the important enquiry, whether the plaintiffs are the legitimate and lawful heirs of the deceased? Indeed, this is the principal and only question which this case presents.

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The inferior court was of opinion that, although Abraham Morehouse was lawfully married to Eleanor Hook, the mother of the plaintiffs, who was in good faith at the time of the celebration of the marriage, yet the circumstance of her having been informed and apprized at a subsequent period of her husband's having another wife living, was sufficient to put her in bad faith; and that therefore, as the plaintiffs were born after knowledge of the fact had been brought home to their mother, and did not claim in representation of their sister Sophia, who was begotten previous to the disclosure of the first marriage, a judgment of non-suit should be pronounced against them.

The defendants, dissatisfied with this judgment, took the present appeal, and now claim, that a definitive judgment be rendered in their favor; on the other hand, the plaintiffs pray in their answer, that the judgment of this court be rendered according to the prayer of their original petition.

The evidence shows, that Abraham Morehouse was married in New York to Abigail Young in 1790, and that two sons were the issue of this marriage. That on the 19th of September, 1799, his first wife being still living, Abraham Morehouse entered into a marriage contract, (in which he states himself to be *a widower*,) with Eleanor Hook, at Washita, in Louisiana, before the Commandant of the District, and that under the said marriage contract, the plaintiffs' mother considered herself his lawful wife, and lived and cohabited with him as such. This evidence is accompanied and supported by the testimony of several witnesses, examined for the purpose of proving, on the part of the plaintiffs, the circumstances relative to the celebration of the second marriage, to the good faith of the wife, and to the disclosure of the exist-

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Where it is clear, a cause is not in a proper *condition* to decide on the important and delicate question involved, and the justice of the case requires it, it will be *remanded* for a new trial, rather than a judgment of non-suit entered.

ence of the first marriage. On the part of the defendants, one witness was examined, whose testimony has a tendency to establish the precise time, at which the plaintiffs' mother became aware of the existence of her husband's first wife. But a careful and attentive examination of the record, such as it now stands before us, has convinced us, that it does not exhibit on either side, all the material facts, which it is in the power of the parties to adduce by legal evidence; that this case is not in a proper condition to enable us, at present, to decide on the important and delicate question of the legitimacy of the plaintiffs; and that justice requires, that it should be remanded for a new trial.

We have come the more readily to this conclusion, that a judgment of non-suit would not preclude the plaintiffs from instituting a new action, in which the same question would again be presented; that a new trial will cause no inconvenience to any of the parties; and that, if from a strict sense of justice, we are prompted to give them a second opportunity of preparing their case and of investigating more fully the matter in controversy between them, the peculiar nature of the uncommon question, which we are called upon to decide in the last resort, seems imperiously to require it.

We shall, therefore, abstain from making any remark or comment upon the evidence which, every way, appears to us insufficient and unsatisfactory for the final determination of this cause.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that this case be remanded for a new trial, the appellants paying the costs of this appeal.

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18L 321
46 1380
18L 321
49 189
18L 321
107 733

Where garnishees are in possession of a slave, transferred to them in Mississippi, by the surviving partner, in payment of a debt *due by the firm*, they will hold it against an attaching creditor of a new *firm*, of which this partner is a member.

Evidence which is introduced and received without opposition or objection, although contrary to, or beyond the allegations contained in the pleadings, the adverse party is bound by its effect.

Where cotton is shipped to consignees, who are entitled to a right of privilege, so that the consignor or owner could not take it out of their hands, *his creditor cannot attach it in their hands*.

So where the defendants gave an order on their attorneys, to pay over the proceeds of certain cotton, which they had attached, to the intervenors, to be credited in their (defendants') account, it is good against subsequent attaching creditors of defendants.

*Garland, J., dissenting.**—It is not shown, that the intervenors made any *specific advance* on the thirteen bales of cotton, and are therefore not entitled to a privilege, under the article 3214 of the Code; consequently the plaintiff's attachment ought to hold the property.

This suit commenced by the attachment of a quantity of cotton, or its proceeds, and of a slave, in the hands of Lambeth and Thompson, which is alleged to be the property of the defendants, Aiken and Gwinn. There was a petition and supplemental petitions filed by the plaintiff at different times, as the facts were disclosed relative to the several items of property sought to be made liable to his attachment against property of the defendants; and also a petition and supplemental petitions put in by the intervenors, (Lambeth and Thompson,) and their answers to the plaintiff's demands. The pleadings are fully set out in the opinion of the majority of the court by Judge Simon.

The evidence showed that the slave Edmund, attached, had been transferred to Lambeth and Thompson in Mississippi, by

* Judge Bullard was not present, when this case was argued and decided. He was, however, present at the consultation on an application for a re-hearing; and concurred with the dissenting judge.

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There were 58 bales of cotton, or its proceeds, attached as defendant's property in the hands of Lambeth and Thompson, which defendants had attached in a suit against their debtor G. W. Reynolds, and gave an order on their attorneys, to pay over the amount of such judgment as they might obtain, to Lambeth and Thompson, who in the meantime were in possession of Reynold's cotton.

The 13 bales were claimed by Lambeth and Thompson for a balance due for various advances of money, acceptances, &c. under an arrangement or agreement between them and the defendants, who were merchants of Vicksburg.

There was judgment against the plaintiff, and in favor of the intervenors, Lambeth and Thompson. The plaintiff appealed.

Elmore & King, for the plaintiff and appellant, insisted that the plaintiff's attachment should have been sustained throughout; that the evidence showed the slave was the property of J. R. Aiken, and not of the old firm of Martin and Aiken; consequently he was liable to the attachment.

2. There was no specific advances made according to the 3214th article of the Code, to give a privilege on the 13 bales of cotton. It was evidently received and intended to be appropriated in payment of a general balance.

3. As to the 58 bales, the transfer of the defendants of their attachment and such judgment as they might obtain, to the intervenors cannot avail; because no notice was given to Reynolds, the debtor, which was necessary, as it was a release of a debt due by L. and T. as garnishees of the plaintiff to that suit.

Peyton & Smith, for the intervenors and appellees.

1. The court below rightly decided according to the evi-

dence introduced by intervenors and garnishees, and received without objection. It is too late to argue that the *probata* do not conform to the *allegata*; 11 Martin's Rep. 26, Bryan vs. Moor's heirs; 6 Martin N. S. 86, McMicken vs. Brown; 1 La. Rep. 301, Leggett vs. Peet et al.

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2. The testimony proves conclusively that the slave attached in this suit belonged to Aiken, as survivor of the late firm of Martin and Aiken, and who are still indebted to Lambeth and Thompson in a sum by far exceeding the value of the slave:— The intervenors therefore are entitled to the preference over the plaintiffs who are only creditors of the new firm; 10 La. Rep., 348, Hagan et al. vs. Scott; 12 Idem, 374, Gardiner et al. vs. Smith; 13 Idem, 281, Claiborne et al. vs. their creditors.

3. The thirteen bales of cotton was received by the garnishees under the special contract made between them and Aiken and Gwinn, by which in substance the latter were made the agents of the former, to purchase and forward cotton to them and advances to an amount far exceeding the value of the cotton received, are proved to have been made. The garnishees are entitled to the benefit of the law for consignees making advances on property, afterwards attached in their possession.— L. C. 3214; La. Rep. 14, p. 476, Turpin vs. Reynolds.

Besides it is proved that the defendants could under the special agreement exercise no control over these thirteen bales. The garnishees might sell them when and how they pleased, and exercise absolute control over them. And the plaintiffs can acquire no greater rights than the defendants had at the levying of the attachment. 7 Martin, N. S., Babcock vs. Malbie.

4. The proceeds of the fifty-eight bales of cotton were transferred to the garnishees prior to the attachment. No notice to Reynolds was necessary, for it was a release of the debt due by Lambeth and Thompson, as garnishees in the former case to the plaintiffs to that suit. By the judgment in that case, the plaintiffs succeeded to the rights of the defendant

EASTERN DIS. against the garnishees in that suit; and as the debt due by the
May, 1841. garnishees in that suit was remitted before the attachment was
 levied in this case—there was no debt due by the garnishees
 to the defendant.—See the case last above cited.

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5. The testimony offered under the rule against the garnishees was properly received. The rule did not call upon them to show cause upon the answers filed only. Besides if the answers confessed facts which authorized judgment for the plaintiff, why take a rule at all? If called upon to show cause, what better cause can be shown than facts proved by witnesses, which show that the plaintiff is not entitled to recover against the defendants in the rule? 13 La. Rep. 468.

Simon, J. delivered the opinion of the court.

On the 8th of April, 1840, plaintiff sued out an attachment against the defendants, which was first levied, among other property, on a negro slave named Edmund; on the 13th of the same month, Lambeth & Thompson intervened, alleging that at the time the attachment issued, said slave was their property, by virtue of a transfer made to them and one James Gwinn on the 1st of May, 1838; that said slave was delivered to their co-transferree in Mississippi, and was by him brought to Louisiana in order to sell the same to pay the debt specified in the transfer, which debt is still due and unpaid. The deed of transfer is annexed to their petition; and they pray that the sheriff be ordered to retain in his hands the slave or its proceeds, and that the same be restored to the intervenors.

On the 20th of May, the plaintiff filed a supplemental petition, made Lambeth & Thompson garnishees, and propounded to them certain interrogatories, to which the garnishees answered by stating: 1st. That they had not in their possession any property, rights, credits or effects belonging to the defendants or in which they were in any manner interested; except thirteen bales of cotton which were sent to them by the defendants in the usual course of business, to pay advances by them made to said defendants. 2d. That fifty-eight bales of cotton, no

mark, had previously been attached in their hands by the defendants as the property of G. W. Reynolds, the net proceeds of which, amounting to \$1049, remained in their possession according to a previous agreement; that on the 7th of April, 1840, one of the defendants, in behalf of both, transferred to them the amount of said proceeds in consideration of moneys to a far larger amount previously advanced by them to the defendants, and gave them an order on Peyton & Smith, their attorneys in said suit accordingly. And 3d. That they had no written communication from the defendants, except the one above mentioned, and had none from Reynolds, &c. The order on Peyton & Smith, is written at the foot of the notice of attachment against Reynolds, and is in the following words:

“Messrs. Peyton & Smith will please pay over to to W. M. Lambeth & Thompson the proceeds of fifty-eight bales of cotton which was consigned to them per the steamboat Bayou Sara, ‘no mark;’ which was attached by us as the property of George W. Reynolds, on the 27th February last, and their receipt will be good for the same.—New Orleans, April 7th, 1840. (Signed) AIKEN & GWINN.”

On the 28th of May, another supplemental petition was filed by the plaintiff who propounded new interrogatories to the garnishees to ascertain the consideration which they gave for the claim against Reynolds; which interrogatories were subsequently answered by their giving a statement of the circumstances under which the claim was transferred, and showing that it was in consideration and in part payment of a large debt which the defendants owed them since the year 1838.

On the 29th of October, 1840, the intervenors filed a supplemental opposition, in relation to the slave Edmund, in which they state that said slave never was the property of the defendants, but belonged to John R. Aiken, and was by him assigned and transferred to pay the debt detailed in the assignment; whereby the proceeds of the slave are still liable to them to be applied in part payment of said debt in preference to plaintiff's, and they pray accordingly. On the 7th of De-

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cember, plaintiff answered the petition of intervention, by pleading the general issue and alleging that the instrument by virtue of which the intervenors claim the slave attached, is fraudulent and void, and never was recorded so as to operate to the prejudice of the attachment.

On the 17th of the same month, a rule was taken on the garnishees to show cause why judgment should not be rendered against them for the amount of the judgment obtained against the defendants; which rule on the 22d of December, was answered by the garnishees averring that the thirteen bales of cotton and the proceeds of the fifty-eight bales, were transferred and delivered to them because the defendants were indebted to Lambeth & Thompson in a large sum of money varying at different times from \$8000 to \$20,000 since 1838, for advances in money, acceptances, &c., by them made to said defendants, and that the same were thus transferred as set forth in their answers to the interrogatories already filed.

On all these issues, the court below first rendered a judgment in favor of the intervenors, sustaining their intervention and ordering the proceeds of the slave Edmund to be paid to them in part satisfaction of their claim against Martin & Aiken; and afterwards rendered another judgment discharging the rule taken by plaintiff on the garnishees. From these judgments, the plaintiff appealed.

This case presents three very distinct matters in controversy between the parties now before us:

1st. The claim set up by the intervenors to the proceeds of the slave Edmund, by virtue of the transfer made to them by J. R. Aiken, as creditors of the late firm of Martin & Aiken.

2d. The right contended for by the garnishees to apply the thirteen bales of cotton found in their possession or their proceeds, to the payment of the advances by them furnished to the defendants previous to the attachment.

3d. Their right to keep the proceeds of the fifty-eight bales of cotton attached in their hands at the suit of defendants

against Reynolds, and transferred to them to be applied to the satisfaction of the debt due them by said defendants.

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The solution of these questions will depend mainly on the application of the general rule so often sanctioned and recognized in our jurisprudence, that when the owner of property has lost all power over it, and cannot change its destination, his creditors cannot attach; 9 *Martin*, 316; 4 *Martin*, N. S., 657; 7 *Idem*, 137; 2 *Ra. Rep.*, 514; 13 *Idem*, 570; 15 *Idem*, 465. And so, if the defendants themselves could not have taken the property in dispute out of the hands of the garnishees, it is clear the plaintiff cannot.

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I. The alleged right of the intervenors to the slave Edmund or its proceeds is predicated upon a deed of transfer or assignment, executed in their favor by John R. Aiken, in the state of Mississippi, on the 1st of May, 1838, *as surviving partner* of the late firm of Martin & Aiken, and for the purpose of securing the payment of a debt of \$15,000 to \$20,000, due by the said firm to the intervenors; in consequence of which, the said Aiken, as survivor of the firm, transferred, assigned and delivered to the intervenors and James Gwinn, certain property and slaves, (the slave Edmund among others,) to have and to hold the same absolutely and forever until the debts therein specified are discharged. The parol evidence, which comes up unobjected to, shows that the deed was executed on the day of its date; that the debt, to secure which the transfer was made, was then justly due by Martin & Aiken to the intervenors; that the slave Edmund belonged to Aiken as survivor of the firm; that he never belonged to the defendants, and that said slave was brought down to New Orleans where he was attached. From this testimony, it appears to us clear that, although the intervenors have not established a direct legal title to the slave attached, yet the same is not and has never been the property of the firm of Aiken & Gwinn, and cannot be attached by their creditors. The intervenors are creditors in a large amount of the firm of Martin & Aiken, to which the slave belongs, and if so, there is no necessity of enquiring into

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the nature of the right which they may have acquired under the transfer from Aiken, as the proceeds thereof must be exclusively applied to the discharge of the debts due by the said partnership, in preference to those of the new firm of Aiken & Gwinn; *La. Code, art. 2794; 10 La. Rep., 348; 12 Idem, 374; 13 Idem, 281.*

It is contended, however, that the *probata* does not agree with the *allegata*, and that the intervenors having alleged in their petitions that the slave was the individual property of John R. Aiken, their allegations must be taken as the highest proof of the fact that it did not belong to the firm of Martin & Aiken. Those allegations ought, in our opinion, to be taken in connection with the act of transfer annexed to the petitions and therein referred to; and there it is positively stated that the property therein described, belongs to the firm of Martin & Aiken, and is transferred by Aiken as the surviving partner of the said firm; moreover, the evidence which establishes this fact was introduced and received without any objection, and it is a well settled rule that a party, who, without opposition suffers evidence to be adduced contrary to or beyond the allegations contained in the pleadings, is bound by its effect; 11 *Martin, 26; 6 Martin, N.S., 86; 1 La. Rep., 301.*

Evidence which is introduced and received without opposition or objection, altho' contrary to and beyond the allegations contained in the pleadings, the adverse party is bound by its effect.

II. The answers of the garnishees to the interrogatories propounded to them by the plaintiff, establish satisfactorily that the thirteen bales of cotton were sent to them by the defendants in the usual course of business, *to pay advances which they had made* previously to the defendants; this evidence, far from being contradicted, is corroborated by the testimony of a witness who states that the thirteen bales *were received* under the arrangement that the garnishees should accept the defendants' drafts at short sight and date, which were to be met by cotton to be shipped to them, &c. And on this point, we cannot hesitate to conclude that, as the defendants had no further control over this cotton, which they could not take out of the hands of the consignees; and as said consignees were entitled to their right of privilege on the same, the plaintiff could not attach it: *La. Code, art. 3214; 14 La. Rep., 477.*

Where cotton is shipped to consignees, who are entitled to a right of privilege, so that the consignor or owner could not take it out of their hands, his creditor cannot attach it in their hands.

III. This last point does not seem to us to present any serious difficulty: the right of the garnishees to the proceeds of the fifty-eight bales of cotton, is clearly established by their answers to the interrogatories; it is shown that this cotton, which was in the possession of the garnishees, had been attached at the suit of the defendants against Reynolds; that as soon as judgment was obtained, said defendants gave an order that the amount of the recovery should be paid over to Lambeth & Thompson, and credited on their account as so much paid on the large debt which the defendants owed them. No attempt was made to contradict their said answers; they are explicit and satisfactory, and although the order is dated one day previous to the issuing of the first attachment in this suit, yet Lambeth & Thompson were not made garnishees with regard to the proceeds of this cotton, before the 20th of May, 1840; and it was not until said garnishees answered the interrogatories propounded to them at that time, by the plaintiff, that said proceeds became a subject of controversy between the parties. We are not prepared to say that it was not a fair transaction, and that its object was to defeat the plaintiff's proceedings. It is perfectly clear that the defendants were bound by the order which they had given; that it was not in their power to change the destination of the money recovered against Reynolds; that it was not necessary to notify Reynolds of the transfer of a claim over which he had no further control under the judgment obtained against him; and that the right of Lambeth & Thompson thus vested previous to the levying of the attachment, could not be destroyed or in any manner affected by the plaintiff's subsequent proceedings.

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So where the defendants gave an order on their attorneys, to pay over the proceeds of certain cotton, which they had attached, to the intervenors, to be credited in their (defendants') account, it is good against subsequent attaching creditors of defendants.

It does not appear to us that the judge *a quo* erred in any part of the judgment appealed from.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

Garland, J. dissenting:

As I have not been able to convince myself of the correct-

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ness of the conclusion the majority of the court have arrived at on one branch of this case, I shall state the reasons of my dissent.

The majority of the court think the intervenors, Lambeth & Thompson, are entitled to a privilege and preference over the attaching creditor on the proceeds of the thirteen bales of cotton shipped by the defendants to the intervenors. On this point I differ with them.

The intervenors are the factors or commission merchants in New Orleans of the defendants, who are merchants in Vicksburg. The clerk and book-keeper of the intervenors says, they have had a running account with defendants for two or three years, in which the balance has always been against them. The present balance is about \$38,000, and since January, 1840, has not been less at any time than \$6000. A great deal of the business of Lambeth & Thompson consists in making advances on cotton. They are sometimes made in cash, sometimes by acceptances and sometimes by advancing cotton bagging, rope and provisions. Has never known them to make advances except when property was in hand or expected. Defendants are merchants in Vicksburg and have been in the habit of purchasing large quantities of cotton from their country customers. The arrangement as to the business between the parties, is, Lambeth & Thompson accept drafts at short sight or date, with the understanding they are to be met by cotton to be shipped them. Lambeth & Thompson send the defendants bagging, rope, and provisions to be paid for by cotton. From two to three thousand bales of cotton were received from August, 1839, to August, 1840, under this arrangement. Bills at long dates are sometimes accepted. The cotton is generally sold as soon as it arrives and defendants have no control over it. They could not take the cotton out of the hands of Lambeth & Thompson until they paid them. The bills of lading are in all cases sent to Lambeth & Thompson. The understanding is not in writing and he derives his knowledge of it from the tenor of the defendants' letters and

conversations with them. Knows of no specific or particular advance on the thirteen bales of cotton in question; they were received under the arrangement mentioned.

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The intervenors in their answers to the supplemental interrogatories say, the debt of defendants to them accrued by making them advances, and they bound themselves to forward cotton and pay cash to meet said advances. The thirteen bales of cotton came into their hands under that agreement. They then proceed to say, they are factors, the defendants are merchants at Vicksburg, who purchase cotton which they consign to them. They making advances, &c. "The arrangement between Aiken & Gwinn and Lambeth & Thompson was based on a well known custom to both parties. There was no written agreement."

It is not shown, that the intervenors made any *specific advance* on the thirteen bales of cotton, and are therefore not entitled to a privilege, under the article 3214 of the Code; consequently the plaintiff's attachment ought to hold the property.

It is not shown that the intervenors made any specific advances on these thirteen bales of cotton, yet they claim a privilege on them and the judgment of the court allows it.

Previous to the adoption of the Louisiana Code, by the mercantile law, factors were entitled to a lien on produce or goods, or their proceeds in their hands, for a general balance of accounts; 8 Martin, 486; 9 Idem, 297; 1 Martin, N. S., 261; 1 La. Rep., 363; 2 Idem, 440.

The article 3152 of the Louisiana Code says, privileges can only be claimed for those debts to which it is expressly granted. The article 3214 says "every consignee or commission agent, who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of *these advances*, with interest and charges on the value of the goods, if they are at his disposal in his store, or in a public warehouse; or if, before their arrival, he can show, by a bill of lading or letter of advice, that they have been despatched to him."

When the legislature adopted these articles of the Code, I not only infer, but it is evident from the expressions used, some change in the law was intended. The intention to my mind is clear that the privilege was intended to apply to specific ad-

EASTERN DIS. vances alone, and so thought this court in the cases in 13 La. May, 1841. Rep., 490, and 14 Idem, 8; and in the latter volume, in the FISK, WATT & CO. case of Turpin vs. Reynolds, 473, the principle of privilege vs. was carried a step further; but the decision in this case goes **MEAD.** beyond it, which in my judgment abolishes the article 3214 entirely; and establishes the privilege for general balances, as the law existed before the adoption of the Code. To this as a question of law or expediency, I am entirely opposed.

As relates to persons out of the State, this is now a question of no consequence, as the legislature by an act passed at the last session gives a privilege to factors for balances due by non-residents; Acts, 1841, pp. 21, 22; but as it relates to our citizens, the question is an important one, as factors become a class of privileged creditors, although the law says no man shall be so, except by express legislation.

In regard to the proceeds of the thirteen bales of cotton, I think the plaintiff ought to recover, and think the judgment should be so amended,

FISK, WATT & CO. vs. MEAD,

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

After the dissolution of a partnership, neither of the partners can bind the other or the firm, without special authority, derived from a new contract between them. Such a contract is essentially that of mandate.

So where a partner drew a bill of exchange in the name of a firm which had been dissolved, on one of the partners and waived acceptance and presentation to the drawee: *Held*, that the latter is not bound, or in any way liable for the payment of said draft.

This is an action by the second endorser of a bill of ex-

change, against the drawee; which bill is described as having been drawn by B. G. Sims & Co. in liquidation, the 4th day of January, 1836, for \$7,961, payable at the Agricultural Bank at Natchez, Mississippi, the 4th July, 1836, to the order of and endorsed by B. G. Sims. The said bill was drawn on the defendant, Cowles Mead; the drawers waiving presentation and *acceptance to the drawee*. The plaintiffs allege they were the owners and holders of said bill, which had been lost or mislaid, but that it had been duly presented for payment, and protested, of which due notice was given to the drawers and endorser. They allege that the said Mead refuses to pay the said bill; and they pray judgment for the amount thereof. This suit commenced by attachment; the parties to the bill all residing in Mississippi.

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The defendant denied any liability on account of said bill; and expressly averred that long before its date, the partnership of B. G. Sims & Co. was dissolved, of which the plaintiffs had due notice; that the name of said firm was signed without the authority or consent of this respondent, wherefore he prays that the suit be dismissed.

The evidence showed that the defendant had been a partner of the firm of B. G. Sims & Co., which was dissolved early in 1834, at which time it was largely indebted to the plaintiffs, between whom large dealings had taken place. The draft in question was drawn in 1836, for the balance then due on account to the plaintiffs, by Sims, who conducted the settlement of the old partnership concern, and as liquidating partner; but it did not appear he had any new or special authority to do so.

The learned Judge presiding, considered the lost instrument sued on, as the mere acknowledgment of Sims, the liquidating partner, of the balance of accounts due the plaintiffs by the old firm of B. G. Sims & Co. of which the defendant was a partner; and not as a bill of exchange in the technical sense. There was judgment for the plaintiffs, and the defendant appealed.

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Rawle, for the plaintiffs.

Elmore & King, for the defendant.

Garland, J. delivered the opinion of the court.

An affidavit was filed on the 16th of December, 1839, by Glendy Burke, one of the plaintiffs, alleging that Cowles Mead was indebted to plaintiffs in the sum of \$7960 10, without any specification of the manner of indebtedness, whether on account, note or draft, and that he resided out of the State. An attachment issued on this affidavit under which one hundred bales of cotton were seized, which, by agreement were delivered to Keyes & Roberts. The next day, a petition was filed by Watt & Burke, styling themselves to be the firm of A. Fisk, Watt & Co., in liquidation, claiming from the defendant the sum mentioned, with interest at 8 per centum from July 4th, 1836. They say they "are holders and owners of a certain bill of exchange for the sum of \$7961 10, drawn by B. G. Sims & Co. in liquidation, to the order of and endorsed by B. G. Sims on Cowles Mead, the said drawers waiving acceptance and presentation thereof to said Cowles Mead, the drawee of said bill which is endorsed by A. Fisk, Watt & Co. dated at ——— on the 4th of January, 1836, payable at the Agricultural Bank in Natchez, on the 4th July, 1836," which said bill at maturity was legally demanded, protested for non-payment, and notice of demand and non-payment given to B. G. Sims & Co. They further allege the transfer of the draft and the issuing of the attachment. In the month of April following, a supplemental petition was filed, alleging the loss of the draft, and diligent inquiry and search for it.

The defendant, for answer, says he is not liable for the draft, that long before it was made, the firm of B. G. Sims & Co. was dissolved, of which plaintiffs had notice. That the draft was signed by Sims without authority, and he is not bound by it.

On these pleadings the parties went to trial.

From the evidence, it appears that Sims and Mead were in partnership, and transacted business to a large amount with Fisk, Watt & Co., the partnership was dissolved about the commencement of the year 1834, of which plaintiffs had notice. Fisk, on the 10th of June, 1833, in a letter to defendant, expresses his gratification at the approaching dissolution of the partnership, and gives notice that his house will not continue business with Sims & Co. except in the way of reduction and liquidation. Yet, we find them in the years 1834 and 1835, continuing to deal with Sims, under the partnership style, and in the name of B. G. Sims & Cowles Mead; charging them with large sums paid, remittances made and adding materially to the accounts by charges for commissions, for endorsements and acceptances. The balance apparently due on the account of B. G. Sims & Cowles Mead of \$4746 32, is charged to B. G. Sims & Co. the 1st September, 1835, and the draft given in the name of the latter firm on the dormant partner, the acceptance waived by the drawer and protest made for non-payment, without the drawee and defendant having any notice. When the partnership was dissolved, it does not appear that Sims had any particular authority to liquidate its affairs or use the name as drawer or endorser of notes or drafts for that purpose, much less to contract new engagements.

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After the dissolution of a partnership neither of the partners can bind the other, or the firm, without special authority, derived from a new contract between them. Such a contract is essentially that of mandate.

In the case of Peters & Millard vs. Gardere, syndic, 8 La. Rep., 568, it was held, after the dissolution of a firm neither party can bind the other without his authority. That authority must be derived not from their former relations as partners, but from a new contract between them. Such contract is essentially that of mandate.—See also 6 La. Rep., 483; 4 Ibid. 82; Gow on Partnership, 280, 231, et seq. Sims had no authority to bind his partner, there is therefore no legal acknowledgment of the balance of accounts, which plaintiffs claim. As to his demand on the accounts he has not sufficiently established it, even if judgment could be rendered in the present state of the pleadings. But we do not well see how a judgment can be rendered for a balance of account on a

So where a partner drew a bill of exchange in the name of a firm which had been dissolved, on one of the partners and waived acceptance and presentation to the drawee: *Held*, that the latter is not bound, or in any way liable for the payment of said draft.

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petition claiming the amount of a draft alleged to be lost, although it may be, as the Judge of the Commercial Court calls it, "a mongrel Mississippi instrument." We are not disposed to be at all technical, but pleadings should have a reasonable certainty, and some connection exist between the allegations and the evidence.

The judgment of the Commercial Court is therefore annulled, avoided and reversed, and a judgment of non-suit rendered against the plaintiffs, with costs in both courts.

BYRNE vs. ORLEANS COTTON PRESS COMPANY.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.**

The plaintiff, as President of the Orleans Cotton Press Company, when there was no salary fixed, claimed \$3000 per annum for his services, and the testimony of witnesses went to show that they were worth it: *Held*, that the sum of \$2000, voted to his successor, be taken as the proper amount to be allowed.

This is an action on a *quantum meruit*, in which the plaintiff claims the sum of three thousand dollars for a year's salary as President of the Orleans Cotton Press Company, before any fixed salary was allowed or established by the board.

The evidence showed that the immediate successor of the plaintiff was allowed two thousand dollars per annum as his salary by a vote of the board.

The plaintiff called witnesses who testified to the faithful services rendered by him as President of the Company, in superintending the Cotton Press and the buildings then going up. These witnesses thought the plaintiff's services reasona-

ble at what he charged ; but it also appeared there was a superintendent of the buildings and machinery besides, at a large salary.

The Parish Judge was of opinion the plaintiff fully established his demand, and gave judgment accordingly. The defendants appealed.

Rawle, for the plaintiff.

Hoffman, contra.

Morphy, J. delivered the opinion of the court.

Plaintiff claims three thousand dollars for his services as President of the Orleans Cotton Press Company from the 21st of January, 1833, to the 17th of February, 1834. The petition alleges that the duties of the office were arduous and engrossed much of the time and attention of plaintiff to the prejudice of his own business. That no salary had yet been affixed to the office when he was appointed ; the company having then but recently commenced operations ; that relying on the justice of the board of directors to allow him a fair and reasonable compensation for his services, plaintiff did continue to incur the responsibility and discharge the duties attached to the office until the aforesaid period. The answer denies that any compensation whatever was due to the petitioner, or that his services are worth the amount claimed. The plaintiff had a judgment below from which the defendants appealed.

This case presents no question of law. From the minute book of the company, which has been laid before us as part of the evidence, we are satisfied that at the time of the election of plaintiff as President of the Company there was no salary yet affixed to the office. A committee named by the stockholders before their incorporation had proposed a sum of one thousand dollars for the services of the President, but their report had never been acted upon ; when on the 8th of April, 1834, shortly after a charter had been obtained from the legislature, the sum of two thousand dollars was fixed upon as the salary

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of the President, but no provision was made for the services of plaintiff, rendered up to the 18th of February preceding. This claim, then, is on a *quantum meruit*. A number of witnesses in the employ of the defendants at the time plaintiff was elected President, testify that his services in that office were worth the sum he claims. They say that he acted not only as President, but superintended the erection of the buildings, made contracts, &c., and attended to almost all the offices of the company to the neglect of his own business as a merchant, which at that time was extensive. On examining the testimony in connection with the minute book before us, we cannot but believe that there is some exaggeration in relation to the plaintiff's services, and the estimate put upon them. The witnesses speak of his superintending the buildings as one of his most arduous duties, and yet we find that the company had appointed a superintendant of the buildings with a salary of two thousand five hundred dollars per annum, during the very time plaintiff was President. There was besides a building committee authorized to purchase materials, engines, slaves, &c. It is clear, however, from the evidence, that plaintiff devoted much of his time and attention to the business and affairs of the company, and is entitled to remuneration. We think that he should receive a sum equal to that allowed to his immediate successor, to wit: two thousand dollars.

It is therefore ordered that the judgment of the Parish Court be reversed; and it is further ordered that plaintiff do recover of the defendants the sum of two thousand dollars, with costs below, those of this appeal to be borne by the plaintiff and appellee.

FLEYTAS vs. PONTCHARTRAIN RAIL ROAD CO.

**EASTERN Dis.
May, 1841.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

**FLEYTAS
vs.
PONTCHARTRAIN
RAIL ROAD CO.**

18L	339
45	1203
18	339
100	49

This is a suit to recover from the defendants the value of a slave, killed by the engine while asleep on their rail road. *Held*, that where the accident may be attributed to the neglect or fault of both parties, the plaintiff cannot recover.

This is an action to render the defendants liable for the value of a slave killed while lying asleep on their road, by the engine running over him.

The testimony, in substance, showed that the negro had either become intoxicated or was by fatigue induced to lie down on the road and go to sleep. On the other hand, the engineer was unable or neglected to take up the engine in time to prevent running over him. The witnesses declared the engine was running at the usual speed, when the discovery of the negro was made, two minutes before coming up; and that she was not stopped in time. An engineer from a neighboring road testified that two minutes was time enough to take up; but he was not present. It was difficult to ascertain which party was most in fault, or guilty of the greatest neglect. There was a judgment, however, for the plaintiff, and the defendants appealed.

Roselius, for the plaintiff and appellee.

Hoa & Eustis, for the defendants.

Martin, J. delivered the opinion of the court,

The defendants are appellants from a judgment by which the plaintiff has recovered the sum of fifteen hundred dollars, the value of a slave, crushed by one of their locomotive engines, while he was lying across their rail road, asleep, intoxicated, or in a fit of epilepsy or other disease.

The testimony does not show that the engineer did not act with due care. He discovered the slave about two minutes before the catastrophe happened; and the chief engineer of

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the Carrollton Rail Road has testified that in ordinary circumstances, a locomotive engine with a train of cars, such as were drawn at the time, may be taken up in half a minute. On the other hand, it is not shown that the slave labored under any disease; and therefore if he fell asleep on the road he was guilty of great neglect; and if he was disabled from taking care of himself by intoxication, his owner cannot expect compensation for him. See the case of Lesseps vs. Pontchartrain Rail Road Company, recently decided; 17 La. Rep., 361.

The defendants' witnesses were mostly persons who were passengers in the train, and had the best opportunity to give information as they were eye witnesses. Those of the plaintiff were not present, but some of them came soon afterwards. The testimony, in our opinion, preponderates in favor of the defendants.

This is a suit to recover from the defendants the value of a slave, killed by the engine while asleep on their rail road. *Held*, that where the accident may be attributed to the neglect or fault of both parties the plaintiff cannot recover.

In cases like the present, where the accident may be attributed to the fault or neglect of both parties, the plaintiff cannot recover. In the case of a collision between two vessels, *Lord Tenterden*, Chief Justice, says, in summing up the case to the jury, "the question is whether you think the accident was occasioned by want of care on the part of the crew of the Robert and Ann? (the defendant's vessel). If there was *want of care on both sides*, the plaintiffs *cannot maintain their action*; to enable them to do so, the action must be attributable *entirely* to the fault of the defendants." 1 Moody & Malkin, 169; or 22 English Common Law Reports, 280.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and that ours be for the defendants with costs in both courts.

BRUCE vs. ROSS ET AL.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY
OF NEW ORLEANS.

BRUCE
vs.
ROSS ET AL.

18L	341
50	235

Where the articles do not contain a clause that the partnership might be dissolved at the will of one of the parties, simply by withdrawing from it, and the other refuses to consent, it becomes necessary for the complaining partner to apply to the court for a dissolution.

But in case of violation of any of the articles of partnership by one partner, the other may dissolve the partnership, even without a stipulation to that effect.

Where a partnership has been properly dissolved by the judgment of the inferior court, and a liquidation ordered, it will be carried into effect by this court.

This is an action by a partner against his co-partner for the dissolution of a particular partnership, entered into for the purpose of carrying on the manufacture of biscuit, crackers, &c., on a new plan according to a patent machine, which they hired from one John Bruce, a brother of the plaintiff, who intervened in this suit. The partnership was entered into on the 17th January, 1838, and this suit commenced in May following.

The plaintiff charges the defendant, Ross, his co-partner, with a positive violation of the articles of partnership, and of mismanaging its accounts and affairs. The defendant in effect admitted some violations of one of the articles of partnership, and was willing the plaintiff might withdraw and leave him in the undisturbed possession of the partnership business. John Bruce interposed and claimed the right to withdraw his patent machine to make buiscuit, in case the partnership was broken up.

The Parish Judge was of opinion the plaintiff showed sufficient cause for a dissolution, gave judgment dissolving the partnership accordingly; and ordered its affairs to be liquidated and settled under the direction of the court, and that the intervenor have the right to take back his patent machine; reserving his right to hire for the use of it.

The defendant appealed.

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Hoffman, for the plaintiff and appellee.

Barker, for the appellant.

Simon, J. delivered the opinion of the court.

The object of this action is the dissolution of the partnership heretofore existing between the plaintiff and the defendant. Plaintiff represents that on the 17th of January, 1838, he and the defendant agreed to form a special co-partnership for the purpose of carrying on the business of baking ship biscuit, crackers, &c., and other articles in that line; and signed and executed a written agreement to that effect. That accordingly a building and necessary machinery were procured and workmen engaged, &c. He further avers that by the 4th article of the agreement, it was declared that a regular set of books of account should be kept for the transactions of the firm; to be settled up monthly, and the profits equally divided. That by the 6th article, it was declared that neither party should be allowed to contract debts or incur liabilities. That by the 8th article, it was provided that the partnership should continue for five years, unless the parties should mutually agree to dissolve it; and that if during that time, either party should violate any of said articles, the other partner might dissolve the partnership. He also alleges that the defendant has violated the 4th and 6th articles by refusing to permit books to be kept and settlements being made monthly, &c.; and also by contracting debts contrary to the will and consent of the petitioner; that he has also violated the 7th article; and that as it now becomes necessary to liquidate the partnership, it is proper that the books be sequestered, in order to enable the court to come to a final and equitable adjustment of the rights of the parties. He prays that the partnership be dissolved, that a division and settlement of the concern may be ordered, and that in the mean time the books be sequestered.

To this petition, the defendant filed a long and explanatory answer, in which, after denying his having violated any of the

articles of the co-partnership, and alleging that he had complied with the same with scrupulous fidelity, he gives a detailed statement of the general affairs and transactions of the partnership, reviews at length all the circumstances relative to its conduct and administration during its existence, and explains the object and purpose of his private dealings and transactions. He further avers that the plaintiff has violated his duty and neglected the business of the firm, expresses his willingness that said plaintiff should withdraw from the partnership and leave him, defendant, to pursue the business on his own account, insists however on objecting to the dissolution of the partnership and to the sale of the effects and property belonging thereto, and concludes by propounding interrogatories to the plaintiff, and praying a decree of the court for general and special damages.

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A few days after the institution of this suit, John Bruce intervened for the purpose of claiming the return of the patent baking machinery which he had hired to the partnership, in the event of its termination; on the grounds that by the articles of agreement between him and the partners, and owing to the circumstances existing between them, said machinery could no longer be used by the firm or by either of the partners.

The court *a qua* ordered that the partnership in question be dissolved, that a liquidation and settlement of the concerns be subsequently made and proceeded upon, subject to such orders as may hereafter become necessary; and that John Bruce's machinery be delivered over to him, reserving his right to claim the amount of the hire thereof against the partnership. From this judgment, the defendant appealed.

It is contended by the appellant that the plaintiff had a right to dissolve the partnership without resorting to the interposition of a court of justice, and by simply retiring therefrom; that this suit is the result of a combination between plaintiff and intervenor; that by the agreement it was the duty of the plaintiff to have kept a regular set of books, and to make

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monthly settlements of the accounts, which he neglected to do; and that said plaintiff has on his part violated the articles of partnership.

In the actual condition of the case, it is very difficult to discover the grounds of complaint of the defendant, against the judgment of the inferior tribunal; the judgment appealed from does not go further than ordering a dissolution of the partnership, and a final liquidation and settlement thereof; and the pleadings show or at least intimate that the defendant himself does not wish the said partnership to continue any longer. He sets up against his partner acts of violation which, he says, he has committed to his prejudice, and appears to rely principally on his claim for damages.

Our enquiry, however, must be limited to the question whether the partnership was properly dissolved on sufficient grounds? The voluminous evidence contained in the record and which we have carefully examined, has convinced us most conclusively that sometime before the institution of this suit,

Where the articles do not contain a clause that the partnership might be dissolved at the will of one of the parties, simply by withdrawing from it, and the other refuses to consent, it becomes necessary for the complaining partner to apply to the court for a dissolution.

both parties evinced by their conduct, a respective disposition to withdraw from the partnership; neither of them appeared to be willing to continue the business together, and this was the principal cause of their violating or not complying with their articles of agreement. It is, however, clearly established that the defendant has actively violated the fourth article, by preventing the plaintiff from having a free access to the books and making a monthly settlement as provided for in their contract; and this circumstance alone is sufficient to authorize the plaintiff to claim the dissolution of the concern. The articles of agreement do not contain any clause that the partnership might

But in case of violation of any of the articles of partnership by one partner, the other may dissolve the partnership, even without a stipulation to that effect.

be dissolved at the will of either of the parties, by simply withdrawing therefrom, as the defendant's counsel has urged; but as the consent of the other could not be obtained by amicable means, it was necessary to apply to the laws of the country for that purpose. The eighth article of the agreement gives to either of the partners the right of dissolving the partnership in case of violation of either of the articles by the other partner,

and without this stipulation, such was their right under the 2858th article of the La. Code.

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We think that without the necessity of entering into any detail of the facts and circumstances proven respectively by the parties in support of the grounds of complaint by them set up against each other, the partnership was properly dissolved, and that the judge *a quo* did not err in ordering the liquidation and settlement of the concerns. Nay, the parties would be placed in a very awkward situation, if, by our judgment we were to revive a partnership which has been actually dissolved for at least three years. All that remains now to be done so as to come to a final adjustment of their respective pretensions, is to carry into effect the judgment of dissolution, and to investigate all the matters in controversy between the parties, as arising from their respective claims against each other, or against the partnership, and as resulting from their acts during the existence of the firm.

Where a partnership has been properly dissolved by the judgment of the inferior court, and a liquidation ordered, it will be carried into effect by this court.

With regard to the intervenor, it does not appear to us that the lower court erred: his contract with the partners contained a clause from which neither of them had the right of using the machinery for their individual benefit or separate from the concern; with the exception, however, of the case of death of either of them, or the withdrawal of one of them from the partnership; in which cases, the survivor or the one who might choose to continue the business, should have the right of continuing the use of the machinery. It is therefore clear that this partnership having not been dissolved by the death of one of the parties, or by the voluntary withdrawal of one of them from the concern, the condition contemplated by the contract founded on the supposition that the same establishment should remain in the hands of one of the co-partners, cannot be realized, and that the intervenor has ceased to be bound by the stipulation inserted in the said contract for the reciprocal benefit of the parties; indeed, from the nature and result of the present controversy, it would be impossible to give effect to and make a proper application of the clause from which one of the

EASTERN Dis. partners is to have the use of the machinery after the dissolution of the firm.
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ROASENDA
vs.
ZABRISKE, F.M.C.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed, with costs.

ROASENDA vs. ZABRISKE, f. m. c.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Parol evidence is admissible to prove usury. This plea would seldom be available if required to be proved by a counter letter or other written evidence.

Where a note does not bear interest on its face, but the act of mortgage taken to secure its payment, stipulates for ten per cent. interest from maturity, the excess charged from its date will be deducted.

This suit comes up on an injunction, obtained to stay an order of seizure and sale.

The plaintiff obtained an order of seizure against two lots of ground, on a note of the defendant for \$7905, payable one year after date, *without interest*; but secured by mortgage on these lots, stipulating that said note should bear ten per cent. interest from maturity, if not then paid. The order issued for the amount of the note with ten per cent. interest from *its date until paid*.

The defendant avers that the note had been several times renewed, on which usurious interest was charged and received. He prays that an injunction issue, restraining said order; that the seizure be set aside, and that the note be cancelled, &c.

On the trial, the defendant offered evidence and witnesses to prove the usury alleged, which was objected to and the objec-

tion sustained by the court on the ground that the matters alleged could not be shown by parol evidence, in opposition to a notarial act or contract. A bill of exceptions was taken to the opinion of the court.

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BOASSENDA
vs.
ZABRISKE, P.M.C.

There was judgment for the plaintiff and the defendant appealed.

Roselius, for the plaintiff.

L. Janin, contra.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment dissolving an injunction which he had obtained to stay the execution of an order of seizure and sale, on the ground that the note secured by the mortgage was partly given on an usurious consideration ; and that the order of seizure and sale charged him with interest from the date of the note, while according to the contract he was only liable to pay interest from its maturity.

The defendant obtained a commission to take the testimony of witnesses with a view of establishing usury. He was ruled to trial before the return of the commission, and offered witnesses for the same purpose, who were rejected; whereupon he took a bill of exception; the court being of opinion that parol evidence was inadmissible, and usury could only be proved by a counter letter or other written testimony, when the payment is acknowledged by an authentic act. The article 2234 of the Louisiana Code was relied on. It relates only to the old exception *de non numeratâ pecuniâ*. The court, in our opinion, erred. The plea of usury would be hardly available in any case if those who rely on it, were bound to prove it by a counter letter or other written evidence.

Parol evidence is admissible to prove usury.— This plea would seldom be available if required to be proved by a counter letter or other written evidence.

Where a note does not bear interest on its face, but the act of mortgage taken to secure its payment, stipulates for ten per cent. interest from maturity, the excess charged from its date will be deducted.

The note does not bear interest on its face, but it is stipulated in the act of mortgage that ten per cent. interest will be paid from the time of its maturity. For this excess of interest, the injunction ought to have been perpetuated, which is obvious

EASTERN DIST. from the face of the papers. The judgment must consequent-
May, 1841. ly be annulled and reversed, and a new one rendered according

PENALTA, to the evidence of the case.
vs.
BORGES' EX'OR.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as, in our opinion, should have been rendered in the court below, it is ordered, adjudged and decreed that the injunction be made perpetual for the excess of interest; that for the balance it be provisionally reinstated; and the case remanded for further proceedings, with directions to the judge to allow testimonial proof of the usury; the defendant and appellee paying the costs of the appeal.

PENALTA vs. BORGES' Executor.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY
 OF NEW ORLEANS.**

Parol evidence is inadmissible to prove title to slaves, but a witness may be received to prove that the defendant admitted he had received and held certain slaves as the agent of the plaintiff.

The plaintiff alleges the succession of Manuel Borges is indebted to him in the sum of \$63,634, for this, that in 1820 he left with said Borges nine slaves, with the understanding that he was to hire out said slaves and remit to him the proceeds at Rio Janeiro, in Brazil; but that he had never received any thing from him. He further alleges that said Borges several times admitted the slaves were left with him to hire out for his (petitioner's) benefit, and that he had totally failed to account for either the slaves or their hire; that their value and

that of their services or hire are well worth the sum he claims, and for which he prays judgment.

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The executors and heirs excepted, and denied the plaintiff's right to maintain his action, and that his opposition should be dismissed.

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On the trial the plaintiff in opposition offered a witness to prove that Borges in his life time had acknowledged that he held these slaves as the plaintiff's agent. This evidence was opposed on the ground that parol proof could not be received to show title to slaves, under the allegations in the opposition, which objection was sustained by the court, and a bill of exceptions taken.

The plaintiff offered the record of a proceeding against him in the United States District Court for the Eastern District of Louisiana, on account of these same slaves.

This evidence showed that a Portuguese vessel with slaves (including the 9 now claimed,) had been captured at sea by Pirates, and recaptured by an American vessel and brought into Charleston, where the vessel and cargo with the slaves were libelled. The slaves were claimed by the vice Consul of Portugal and given up as belonging to Portuguese subjects, and the plaintiff appointed agent of the Portuguese claimants to convey them thither. They were put in the schooner North Star and brought to New Orleans, in order to procure a vessel to take them to Portugal. The vessel was seized, and the plaintiff arrested for violating the slave trade laws. He was however released, and in the meantime put the slaves into the possession of Manuel Borges, as he alleges to be hired out. He shortly after left this country for Brazil. Borges never accounted, and lately died. The slaves or their value, hire, &c. are now claimed by Penalta, the Portuguese agent who had them in possession and placed them with Borges.

The Judge of Probates says in his judgment, the slaves "did not belong to Penalta, but were the property of certain Portuguese subjects, and that the opponent (Penalta,) only acted in relation to said slaves as agent of the Portuguese Consulate.

EASTERN DIS. He therefore can maintain no action in his individual capacity.”
May, 1841. The opponent appealed from this judgment.

PENALTA,
vs.
BORGES' EX'R.

Jennings, for the appellant.

Roselius, for the appellees.

Martin, J. delivered the opinion of the court.

The plaintiff is appellant from a judgment which refuses his claim to be placed on the tableau of distribution, of the estate of the defendant's testator, for the sum of sixty-three thousand six hundred and thirty-four dollars, being for the hire and value of nine slaves which he left with the deceased, to be hired for his (plaintiff's) benefit.

The facts of the case are these :—A Portuguese vessel with a cargo of slaves, of which the above nine made a part, was captured by a Pirate on the high seas, recaptured by an American vessel and brought into the port of Charleston; libelled, and the slaves decreed to be restored to the vice Consul of Portugal. This officer finding no vessel destined to a Portuguese port, in Charleston, the plaintiff was employed to seek for such a vessel elsewhere, and for this purpose brought the slaves to New Orleans, where he delivered them to the deceased Manuel Borges, and soon after left the country. This happened about 20 years ago.

There is no evidence of the probable value of the slaves in question or their hire. The Judge of Probates has dismissed the case for want of this evidence.

Parol evidence is inadmissible to prove title to slaves, but a witness may be received to prove that the defendant admitted he had received and held certain slaves as the agent of the plaintiff. There is a bill of exception taken to the rejection of a witness offered to prove that Borges acknowledged he had received and held these slaves as the agent of Penalta; the witness was rejected on the ground that parol evidence cannot be received to prove title to slaves. The position assumed is correct, but not applicable to the present case, in which nothing was sought to be proved, but that the deceased was the plaintiff's agent to hire the slaves and account for the proceeds.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and the case remanded for further proceedings, with directions to the Judge to admit testimonial proof of the agency of the deceased in receiving the slaves in question on hire; the costs of the appeal to be borne by the estate.

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vs.
DEPEYSTER.

PORTER vs. DEPEYSTER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

According to the Civil Code of 1808, when property was acquired *jointly* by several persons by inheritance, purchase or otherwise and could not be partaken in kind, it might be partitioned by *cant* or *licitation* to the highest bidder among the co-proprietors.

When the co-proprietors were all of full age the licitation could take place amicably and by private sale; but if any disagreed, were minors, interdicted or absent, the property could only be sold at public sale, after the usual advertisements, but any of them could purchase. This operated a mode of partition.

So where joint property is sold after the death of one of the co-proprietors, and purchased by his co-proprietor, who is also the executor, causing the sale:—*Held*, that it was the effect of the action *communis dividendo*, and the executor was not deprived of his right, in common with the other co-proprietors to purchase.

This is an action in the nature of jactitation or slander of title. The plaintiff, originally Mademoiselle Camile Prieur, now widow Porter, residing at Toulouse in France, and relic of the late Benjamin P. Porter of New Orleans, alleges that being the lawful owner of two lots of ground in New Orleans, formerly held and owned *jointly* by her late husband with William A. Depeyster, she has sold said lots, but the defendant, Wm. A. Depeyster, son of the late co-proprietor with

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her husband, pretends to have claims on these lots, to her great injury, by preventing the purchasers from paying the balance of the price due thereon; that he continues to make said claim on them although amicably requested to desist:—Wherefore she prays judgment that he be condemned to desist from his pretended claim, and to cease slandering the title of her property, and for damages, &c., and that her title be declared valid.

The defendant pleaded the general issue; and averred that he was owner of one undivided fourth part of the lots in question, and that he has never been divested of his right and title either by alienation or otherwise:—He prays that said undivided fourth part be decreed to him, and that he be put in possession thereof, &c.

Upon these pleadings and issues the parties went to trial.

The evidence showed that the two lots in contestation were purchased and owned jointly by Benjamin Penrose Porter and William Abraham Depeyster, who were practising attorneys in New Orleans. In January, 1818, Depeyster died, leaving his co-proprietor, B. P. Porter, one of his three executors, who qualified and acted as such. In April, of the same year, Porter filed his petition against Felicité Prieur, widow of Depeyster, praying for a sale and partition of the property owned and held jointly between them. This was ordered, and the sale made by an auctioneer as of partnership or joint property, when Porter became the purchaser. The sale took place in the spring of 1818. Porter having since died, and all his descendants, his widow became the sole owner of the lots now in dispute. The heir and descendant of Depeyster claims upon the ground that the sale and purchase by Porter (he being executor of Depeyster,) was illegal and null.

The District Judge was of opinion that according to the provisions of the Novissima Recopilacion, lib. 10, tit. 12, law 1; and Civil Code of 1808, p. 247, art. 174, and page 68, art. 51, the purchase of property by an executor, at the sale of an estate administered by him, was prohibited; yet this prohibition does not apply to the licitation or sale of the property held in undivided

ownership between him and his co-proprietor, the ancestor of the defendant; *Idem*, p. 188, art. 174. EASTERN DIS.
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There was judgment for the plaintiff confirming her title to the property she claims; and the defendant appealed.

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Denis, for the plaintiff and appellee.

Rousseau, for the defendant and appellant.

Morphy, J. delivered the opinion of the court.

The petition charges, that plaintiff being the lawful proprietor of two lots of ground in the city of New Orleans sold one of them to Nathaniel Dick for \$30,000, and the other to John Parker for \$16,300; that without any just ground whatever, defendant pretends to have some claim on the said lots, to the great injury of the petitioner who is thereby prevented from receiving a balance of the price yet due to her because the purchasers by reason of this pretended claim of defendant refuse to pay the same; that defendant has been amicably requested to desist from thus setting up any claim to these lots, but that he persists in so doing. The petition concludes with a prayer for damages, and for a decree enjoining defendant to desist from his pretended claim and not to slander any more the title of the plaintiff to this property.

The defendant avers that he is the only legitimate son of the late Wm. A. Depeyster, that as such he is the true and lawful owner of one undivided fourth part of the lots described in the petition, and that he has never been legally divested of his title to the same. There was a judgment below in favor of the plaintiff, declaring her title to the property to be good and valid. The defendant appealed.

The record shows that B. P. Porter and Wm. A. Depeyster, formerly practising attorneys and partners in this city, became joint proprietors, by purchase, of sundry pieces of real estate. Depeyster died in 1818, leaving a widow and a son, the defendant, then a minor under the age of puberty. By his last will he appointed for his executors, his wife, his partner, Porter,

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and Dennis Prieur, who all three accepted the trust and qualified. Shortly after, Porter instituted in the District Court an action in partition, in which a judgment was rendered decreeing the sale at auction of all the property held in common between him and the deceased, for the purpose of effecting a partition. At this sale, the lots in dispute were adjudicated to Porter, but he and his children having since all died intestate, the property came into the possession of the plaintiff as their sole heir. In 1822, Porter, as acting executor of Depeyster, rendered his account in the Court of Probates, and one-half of the price of these lots was carried to the credit of the succession. Upon examination of this account it was found correct, and a judgment was rendered approving the same, and discharging Porter from his trust.

The case has been submitted to us on the single question whether Porter, being one of the executors of Depeyster, could lawfully become the purchaser of the property in dispute at the sale made to effect a partition of it.

The counsel for the defendant relies on the Spanish law then in force and to be found in the *Novissima Recopilacion*, lib. 10, tit. 12, l. 1; he has referred us also to 11 Martin, 297; 5 La. Rep., 20, and to divers articles of the old Civil Code. These laws and authorities establish beyond any doubt that it was unlawful for an executor to purchase the property of a succession confided to his administration. This rule is not peculiar to the Spanish law; it obtains, it is believed, in almost every system of jurisprudence, but does it apply to a case like the present? We think not.

According to the Civil Code of 1808, when property was acquired jointly by several persons by inheritance, purchase or otherwise and could not be partaken in kind, it might be partitioned by *cant* or *licitation* to the highest bidder among the co-proprietors.

The adjudication by which Porter became the sole owner of the property in question was not, in contemplation of law, a purchase from the estate of Depeyster. When property was acquired jointly by several persons by inheritance, purchase or otherwise, and it could not be partaken in kind, our late Civil Code pointed out as a means of partition the *cant* or *licitation* of it among them. It consisted in adjudging the common property to the highest bidder for it among the co-proprietors.

When they were all of full age, the licitation could take place amicably and in such manner as they agreed upon; but if any one of them disagreed, was under age, interdicted or absent, the property could be put up for licitation only at a public sale, and after the usual advertisements; Civil Code of 1808, p. 188, arts. 172, 175. The adjudication of the common property, if made to a stranger, operated as a sale to all intents and purposes; but when made to one of the co-heirs or co-proprietors it was not in law a sale, although it bore all the appearances of a sale. It was considered a mode of partition, one of the effects of the action *communi dividando*; in the words of the Code, it was the complement of the partition; Idem, p. 188, art. 174. The adjudication to one co-heir or co-proprietor had only the effect of putting an end to the indivision and of determining the rights of the joint owners in the common property; before licitation, the right of each co-proprietor extended to the whole and to every part of the undivided thing; there was no portion of it to which each co-proprietor could be said to be without any right; it was *Totum in toto, et totum in qualibet parte*. By the effect of the licitation, the right of the co-proprietor who gave the highest bid became absolute to the whole property, while that of each of the other owners of the property resolved itself into a claim for their respective shares of the money for which it was adjudged. No new title passed by the licitation, and the co-proprietor who kept the property at the highest bid was considered in law as having been the sole owner of it from the beginning, under the obligation of paying to his co-proprietors their proportions of the price to which it might subsequently be carried by licitation between them.

In describing the effects of licitation, Pothier says, "Lorsque plusieurs légataires ou plusieurs acquéreurs licitent entr'eux un héritage qui leur a été légué en commun, ou qu'ils ont acquis en commun, celui d'entr'eux qui s'en rend adjudicataire, est censé avoir été directement légataire ou acquéreur du total de l'héritage, à la charge seulement de faire raison à ses co-légataires ou co-acquéreurs, de leur part dans le prix

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When the co-proprietors were all of full age the licitation could take place amicably and by private sale; but if any disagreed, were minors, interdicted or absent the property could only be sold at public sale, after the usual advertisements, but any of them could purchase. This operated a mode of partition.

EASTERN DIS. auquel l'héritage serait porté par la licitation qui en serait faite
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"Il suit de ces principes que la licitation entre co-héritiers ou co-propriétaires n'est pas dans notre droit un contrat de vente que les parties licitantes fassent de leur part dans l'héritage licité à celui d'entr'eux qui s'en rend adjudicataire, puisque suivant les susdits principes, l'adjudicataire n'acquiert proprement tiers de ses co-héritiers ou co-propriétaires."—

Traité de la vente, No. 698, 699. This doctrine is held by all the writers on the Napoleon Code from which have been borrowed the provisions of our Civil Code on the subject. 2 Troplong, *vente*, No. 859, and fol. and No. 876; 12 Toullier, No. 155; Merlin, *verbo licitation*; Civil Code of 1808, p. 866, art. 118, p. 206, art. 249, p. 188, art. 174. If then

So where joint property is sold after the death of one of the co-proprietors, and purchased by his co-proprietor, who is also the executor, causing the sale. Held, that it was the effect of the action *communi dividendo*, and the executor was not deprived of his right, in common with the other co-proprietors to purchase.

the adjudication to Porter was only one of the effects of the action *communi dividendo*, we cannot think that the circumstance of his being the executor of Depeyster had deprived him of the right which he had, in common with his co-proprietors, of keeping these lots at the highest bid they might reach at public sale. If instead of a partition effected by licitation, a partition in kind had taken place, it would surely not be contended that Porter could acquire no portion of the property partaken because the estate of which he was executor had in it an undivided interest; in either mode of partition his title to the property would have been the same. The rule that an executor cannot purchase property of the estate he administers, does not therefore in our opinion apply to a case like the present. This was intimated in *Scott's executrix vs. Gorton's executor*; 14 La. Rep. 122. The very object of the partition was to determine what property belonging to Depeyster's estate, was to be administered upon. Until this was done, it could not be known whether the right of the estate was to the property itself or to a sum of money. According to the principles above laid down, the very moment the adjudication was made to Porter, his former co-proprietor was considered in law as having never had any title to the lots

themselves, but only a right to receive a proportion of the money they might bring by licitation. The share of the deceased in the common property which by the partition was determined to consist of a sum of money, has been administered upon by the executor and his account has been duly homologated.

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vs.
MURRAY.

The judgment of the District Court is therefore affirmed with costs.

MOFFATT vs. MURRAY ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the pleadings charge the plaintiff with fraud and collusion as the holder of a note, and the evidence shows its extinguishment by payment, he is bound to prove he gave a valuable consideration for it before maturity, without any knowledge of what had passed, or he cannot recover.

The interest which disqualifies a witness, must be the prospect of gaining an advantage, or to profit by the judgment in the cause, in which he is called to testify.

This is an action by the holder against one of the makers and endorser of a promissory note signed by Murray & Cassidy, payable to the order of and endorsed by Eusebe Belot.

Belot admitted his endorsement, but denied his liability, or that the plaintiff was the *bona fide* holder of said note. He averred it was given to him in payment and secured by mortgage on a slave; and that James Cassidy is the true holder and owner thereof. That before the note was at maturity, Murray and Cassidy dissolved partnership, and Cassidy assumed payment of the debt; that being in want of money, long before maturity, he sold the note to Cassidy for \$750, and delivered it up to him; that Cassidy has since sued his creditors and

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placed respondent on his schedule for the amount of the note with mortgage on the slave, &c. He expressly charges that the plaintiff is not the owner, but has colluded with Cassidy to defraud this respondent out of the amount of said note, and prays judgment in his behalf.

Murray expressly averred that the note sued on was extinguished by payment and delivered up to Cassidy, the maker thereof, and who was bound to take it up.

Upon these pleadings and issues the cause was tried.

Riviere, a witness for the defendants, declared that he has had the note sued on, in his possession; it was made in consideration of the sale of a Coffee-House from Belot to Cassidy and Murray, for \$1000, and which Cassidy bought from Belot for \$750, for which witness blamed him very much. Belot not being a man of business, he did not take the precaution to erase his name, on the back, when he sold it to Cassidy. The note was sold to Cassidy 5 months before it was due.

Riviere's testimony was objected to by plaintiff, on the score of interest; he being placed on Cassidy's schedule as a creditor.

There was judgment in favor of the defendants, and the plaintiff appealed.

Greiner, for the plaintiff.

Preston & Grivot, for the defendants.

Morphy, J. delivered the opinion of the court.

This action is brought on a promissory note of \$1000, drawn by Murray & Cassidy, to the order of and endorsed by Belot. Separate answers have been filed by the defendants, but to the same effect; they state in substance that the plaintiff is not the bonâ fide holder of the note sued on, but that it belongs to John Cassidy; that this note had been given to Belot in payment of a debt of the drawers to him and secured by mortgage on a negro named Richard; that sometime after, Murray & Cassidy dissolved their partnership, and Cassidy

assumed the payment of all the debts due by the concern; that after frequent applications from Cassidy to discount this note, Belot being in want of money consented to receive \$750 in full payment of it and returned it to Cassidy; that the said Cassidy has since made a surrender to his creditors, and has placed Belot as a creditor upon his schedule for the amount of this note, and that it is only since these proceedings that the plaintiff has declared himself the owner of the note; they further deny that plaintiff ever gave any valuable consideration for said note, but on the contrary aver that he has colluded with the insolvent in order to deprive defendants of its amount for the benefit of the latter. There was a judgment below for the defendants, and plaintiff appealed.

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Pierre Riviere, a witness for defendants, testified that he has had the note sued on in his possession; that it was made in consideration of the sale of a coffee-house from Belot to Cassidy & Murray; that about five months before the maturity of this note, Cassidy, one of the drawers bought it for \$750, and that Belot not being a man of business did not take the ordinary precaution of erasing his name on the back of the note before he returned it to Cassidy. The circumstance disclosed by this witness proves clearly the extinguishment of the debt. After thus regaining possession of his note it was a gross fraud on the part of Cassidy to put it again in circulation with Belot's name on it as endorser. When he filed his schedule he well knew that Belot was no longer the holder of the note, and his putting down his name as a creditor for its amount creates a strong presumption that he had not yet passed the note to any one. But if owing to Belot's neglect to erase his endorsement Cassidy has been enabled to negotiate this note; and if the plaintiff had taken it in good faith before its maturity, and without any knowledge of the circumstances under which it was replaced in circulation, it is by no means clear that he would be without any right to recover. In this case, however, the record furnishes no evidence of any attempt on the part of the plaintiff to establish from whom he holds this note or what

Where the
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consideration he gave for it. Under pleadings which charged him with fraud and collusion, and evidence showing the extinguishment of this note, he was bound to prove that he had given for it a valuable consideration before maturity and without any knowledge of what had passed in relation to it. We are of opinion that the plaintiff cannot recover; but that the judgment below should have been only one of non-suit.

The interest which disqualifies a witness, must be the prospect of gaining an advantage, or to profit by the judgment in the cause, in which he is called to testify.

The testimony of Riviere has been objected to on the score of interest. The bill of exceptions does not state the nature of his interest; we understand it however to be that interest which he, in common with the other creditors of Cassidy, is supposed to have in increasing the fund to be distributed among them. The interest which legally excludes a witness must be the prospect of gaining an advantage or profit by the judgment in the cause in which he may be called upon to testify, and which would be an immediate consequence of such judgment. The decision in this case, if in favor of defendants, would leave yet to be tried the issue between the plaintiff and the creditors of Cassidy, as to the right of the former to the proceeds of the slave mortgaged to pay this note; the result of that controversy will depend on the evidence adduced in it, and will not be governed by the judgment in this case. The interest of this witness is only in the question, not in the event of the suit; it may affect his credibility but not his competency; 4 La. Rep., 201; 10 Idem, 24; 3 Martin, N. S., 12.

It is therefore ordered that the judgment of the District Court be reversed; and that ours be for the defendants as in case of non-suit; the appellees to pay the costs of this appeal.

GERMAN Et Ux. vs. NICHOLLS Et Al.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

GERMAN ET UX.
vs.

NICHOLLS ET AL.

The legitimate daughter will inherit the property of her deceased mother to the exclusion of an illegitimate son, not born in wedlock.

Property purchased under the husband's own judgment becomes a part of the community; although it may entitle him to the *price* which he paid for it, as a charge in the settlement of the community.

This is an action instituted by the plaintiff, Thomas German and his wife Edna Wood, to recover the undivided half of two lots in the city of New Orleans, in right of her mother, the late Nancy Nicholls. She alleges and shows that her mother had intermarried with one Reuben Nicholls, and that during the marriage, the lots in question were acquired, and were part of the community existing at her mother's death, between her and her husband.

She further shows that, the defendant, Nathan Nicholls, is in possession of said property without any right or title to it; at least to one undivided half, and prays judgment for her interest and part therein.

The defendant denied the plaintiff's right, as heir or otherwise, or that any community ever existed between Nancy Wood and Reuben Nicholls. He sets up title in virtue of a sheriff's sale. Reuben Nicholls now intervened and claimed the property in his own right and as never having been divested of his title. He denied both the plaintiff's and defendant's titles or claims to the disputed premises.

Upon these issues the case was tried. The evidence of the case is fully stated in the opinion of this court. There was judgment in favor of the plaintiff for only one fourth of the property she claimed; the District Judge being of opinion there was another heir. The petition of intervention was dismissed and the intervenor appealed. By agreement, the appeal comes up as to all the parties.

Benjamin, for the plaintiff, insisted on her right to recover :

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1. The property described in plaintiff's petition was clearly community property, and the community existed at the death of plaintiff's mother. She is shown to be the only legitimate heir of her mother, and as such is entitled to all her mother's interest in the community. La. Code, arts. 2314, 2371—see also La. Code, 1401, 2, 4, and the note of Sirey thereon—also 1 La. Rep. 520.

2. The sale in the suit of Hanse & Hepp vs. R. Nicholls has not divested the title of Mrs. Nicholls or her heirs.—They were never made parties.—The debt for which the property was sold was a private debt of R. Nicholls, contracted before the marriage, for which community property could not be made liable; La. Code, art. 2372. The sale was made after Mrs. Nicholls' death, and on its face purports to convey nothing but the title of R. Nicholls. The plaintiff therefore prays that the judgment of the court below be amended in her favor as prayed for in the answer to the appeal.

Roselius, for the defendant, insisted that the evidence did not show that the plaintiff's wife was the legitimate heir of Mrs. Nicholls, whose real name was Nancy Trice; and further, that there was no community of property existed between Nancy Trice and Reuben Nicholls. She was the lawful wife of another man, with whom she had lived.

2. The evidence shows that Reuben Nicholls was divested of all title to these lots by the sheriff's sale to Nathan Nicholls, the defendant. That he holds by a good and valid title and cannot be evicted by the pretensions of either of the adverse parties to this suit.

M. M. Robinson, for the Intervenor, made the following points:

AS AGAINST THE DEFENDANT:

1. The sale under which he claims was fraudulent and void. See testimony of Burrough's for what occurred at the sale,

and the cases of *Sides vs. M. Cullough*, 7 *Martin*, 654; *Broussard vs. Sudrique*, 4 *La. Rep.*, 347, and *Brown, &c. vs. Cobb*, *Eastern Dis. May, 1841.*
&c., 10 *Idem*, 172; that parol evidence is admissible under the circumstances of the case. *GERMAN ET UX. vs. NICHOLLS ET AL.*

2. The defendant was incompetent to purchase at the sale, being the agent of intervenor, whose property was sold. See *Shepherd vs. Perry*, 4 *Martin*, *N. S.*, 273-5.

3. He is not entitled to allowance for improvements, being a holder in *bad faith*; *La. Code*, 3414-16.

AS AGAINST PLAINTIFF :

1. Her title as legitimate daughter of the wife of intervenor is not established by legal or satisfactory proof.

2. The property in suit was not community property of Nicholls, the intervenor, and his wife; one of the lots is clearly proved to have been purchased by intervenor at a sale under a judgment in his favor against Hayward Pierce, for a debt due anterior to the marriage.

Martin, J. delivered the opinion of the court.

The plaintiff's wife, Edna Wood, claims to be the sole heir of her late mother, who had intermarried with one Reuben Nicholls; and as such alleges she is the owner of the undivided half of two lots of ground in New Orleans, acquired by the husband of her mother, during marriage, making part of the community property at her mother's death, and which is now in the possession of the defendant. The defendant pleaded the general issue; and denied the heirship of the plaintiff's wife; or that any community of property ever existed between the plaintiff's mother and Reuben Nicholls; that she was not his lawful wife, having been previously married to another; and that the marriage alleged to have existed between them was null. The defendant further averred that he was the lawful owner of said lots, having acquired them by purchase in his own right at sheriff's sale; that he holds under Reuben Nicholls, who had bought them with his own funds, belonging to

EASTERN DIS. him individually, and they never entered into the community,
May, 1841. if any ever existed between the plaintiff's mother and said R.
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When the cause was at issue, Reuben Nicholls intervened ; opposing both plaintiff and defendant, alleging the lots in question to be his property. He states that being about to leave the State temporarily, he made a simulated sale of said lots to the defendant, Nathan Nicholls, in whose possession he placed them for the sole purpose of protecting them in his absence, and taking a counter letter accordingly. But in violation of his trust, the said Nathan had the lots sold by the sheriff to satisfy a judgment existing against him at the time of the simulated sale ; although he had provided the said Nathan Nicholls with funds out of which he had bound himself to discharge and pay off said judgment.

The District Judge was of opinion from the evidence that the plaintiff's wife was not the sole heir of Mrs. Nicholls, but that there was a son also who must divide the inheritance. There was judgment in favor of the plaintiff for only one undivided fourth of the lots, with her proportion of the rents and profits, and against the intervenor, from which he alone appealed. But the parties have joined in an agreement that the whole case might be determined in this court, in the same manner as if either or both of the original parties had appealed.

We will first notice the petition of intervention. The District Judge was of opinion that the intervening party must suffer from his ill-placed confidence in the fidelity of the person to whom he made a simulated sale of the property. That his title in the lots was divested by the sheriff's sale ; especially as that sale was made with his consent and co-operation, as is proved by his own witness, Burroughs : And it no where appears that the defendant had any funds of the intervenor, with which he might have paid off the judgment, under which this property was sold.

On the other hand the counsel for the defendant strenuously urges that the present case is not such an one, as respects the claim of the intervenor, in which a court of justice will lend its aid; that the rights of the intervenor, admitting he has any, arose *ex turpi causa, ex dolo malo*, and that the possession of the defendant ought to be protected.

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As the case is now presented to us, we do not think proper to decide further between these parties, than to dismiss the petition of intervention; leaving them to the litigation of any rights they may have in relation to the matters in contestation between them, hereafter.

The plaintiff's wife has fully shown that she is the lawful daughter of her mother while the latter was the wife of James Wood, and born in wedlock; and that the mother after the death of Wood intermarried with Reuben Nicholls, who acquired the property in controversy during said marriage.

The plaintiff's counsel complains, in this court, that judgment was given for only one-fourth of the premises claimed, when it should have been for one undivided half. The District Judge was however of opinion that the plaintiff's wife was not the sole heir of her mother, but that the latter had a son who is also heir. The evidence shows that the mother was unmarried when she had this son, and that he is, if living, illegitimate. These facts were proved by evidence which was received without objection.

The District Judge was therefore in error in concluding that the plaintiff's wife was not the sole heir. For even if the son were living, he is shown to be illegitimate and cannot inherit with his legitimate sister. She is therefore entitled to one undivided half of the lots in controversy. It has been further urged by the defendant's counsel, that one of the lots was purchased by Reuben Nicholls at a sheriff's sale, under an execution which issued on a judgment which was his private property. This does not prevent the lot when purchased, from becoming community property; although it may entitle

The legitimate daughter will inherit the property of her deceased mother to the exclusion of an illegitimate son, not born in wedlock.

EASTERN DIS. him to the price which he paid, as a charge, in the settlement
May, 1841. of the community. The other lot appears to have been pur-
GERMAN ET UX. chased and acquired in the ordinary course of business during
vs.
NICHOLLS ET AL. the marriage and is clearly community property.

Property pur-
 chased under
 the husband's
 own judg-
 ment becomes a
 part of the com-
 munity; altho'
 it may entitle
 him to the price
 which he paid
 for it, as a
 charge in the
 settlement of the
 community.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as, in our opinion, should have been rendered in the court below: It is ordered, and adjudged that the plaintiff, Edna Wood, wife of Thomas German, do recover of the defendant the one undivided half of two lots of ground, described in the petition; to be partitioned according to law: allowing the defendant the estimated value of the improvements and buildings made by him on that portion of the lots which may in the partition be given to the plaintiff: And it is further ordered and adjudged that said plaintiff do recover of the defendant rent at the rate of fifteen dollars per month from the 26th of May, 1835, the date of judicial demand, until the delivery of possession of the one undivided half of said lots to the plaintiff: And that the cause be remanded for the purpose of making a partition and ascertaining the value of the improvements and amount of rent accrued: That the intervention be dismissed at the costs of the intervenor; reserving any rights that may exist between him and the defendant; the latter paying the costs of the appeal.

RUSSELL ET AL. vs. WILSON.

**EASTERN DIS.
May, 1841.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**RUSSELL ET AL.
vs.
WILSON.**

The act of 1826, which declares that in cases where the debt is not yet due and the creditor swears his debtor is about to remove his property out of the State before said debt becomes due, "an attachment may issue," does not apply to Steam-Boats and Vessels, which from their nature must necessarily be taken from the State.

This suit commenced by attachment. The plaintiffs allege they are residents of the State of Kentucky, and hold a note on the defendant, who resides in Mississippi, for \$6420, executed and signed at Vicksburg, by the defendant and others, payable at the Merchants' Bank in New Orleans, on the 1st March, 1841; which note they further allege, is secured by mortgage executed by said Wilson on the steam-boat Rodolph, the 20th March, 1840. They pray that the boat be attached, &c. The attachment was applied for on the 23d February, 1841; being several days before the debt became due. The plaintiff, Russell, made the usual affidavit, "that the defendant resides permanently out of the State; and was about to remove his property from the State of Louisiana, before said debt became due." The attachment issued and was levied on the steamboat Rodolph, and she was also sequestered. On the 12th March, 1841, the defendant's counsel took a rule on the plaintiffs, to show cause, why the attachment and sequestration should not be set aside, on the ground of insufficiency of the security; that the debt was not due, and the suit premature at its inception; and that the affidavit was not true.

On hearing the rule, evidence was taken relative to the issues, and facts involved. It appeared, there was no intention to remove the boat, with a view of avoiding this debt. She was running in the Yazoo trade, and making her regular trips.

There was judgment, making the rule absolute. The plaintiffs appealed.

Peyton and Smith, for the plaintiffs.

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RUSSELL ET AL.
vs.
WILSON.

1. That statute requires only, that "the creditor has reason to believe, and does verily declare, that the debtor *intends to remove* his property." Now "the creditor swears, that said debtor *is about to remove* his property." Acts, 1826, p. 170, sec. 7.

2. That statute referred only to the debtor who, it was believed, intended to remove his property, *at any time*, whether before or *after* the debt should become due. The law now applies only to creditors, who are about to remove their property "before said debt becomes due."

3. That statute applied only to the debtor who was "about to *depart permanently* from the State or to remove *his* property." This, says the Supreme Court, 5 Martin, N. S., 454, means only debtors who reside in the State at *the time of the contract*. Granted.—But the law is different now. The departure of the debtor now does not authorize an attachment, however permanent the departure may be. The word "his," before property is not restricted now to the description of the debtor in the previous clause of the sentence. On the contrary, now the attachment may issue if oath be taken in conformity to any of the requisites of number one, two or three of article 240. The requisite of number two is "when such debtor *resides* out of the State." So that the "*residence*" at *the time of the attachment* is the only question which can be now raised as to residence. The section of the act of 1826 is expressly styled an amendment of articles 242, 243 and 244 of the Code of Practice: while the section of the act of 1817 has no reference to the 2d section of the same act, which corresponds to the articles of the Code of Practice cited. So that the law now applies to *any debtor* who (1st) is about leaving permanently the State, or (2d) who *resides out of the State*, (3d) who conceals himself to avoid being cited, and the law by the act of 1817 applied only to the debtor who had resided here and was "about permanently to depart" or remove his property. This construction of the law as it now stands was adopted by this court in the case of Tyson et al. vs. Lansing; 10 La. Rep., 444.

The law is now, as to attachment, somewhat similar to the law before the act of 1840, relating to arrest on which this court decided that the debtor who absents himself *even for a limited time* might be held to bail; 13 La. Rep., Roberts et al. vs. Page. EASTERN DIS.
May, 1841.
RUSSELL ET AL
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WILSON.

C. M. Jones, for the appellee, contended that the suit was premature. The note was payable at a particular place, and payment must first be demanded before suit, at the place designated; 15 La. Rep., 242.

2. It was well known between these parties, as the evidence shows, that the note was given as part of the price of the boat, and that she was to run in the Yazoo trade, in which she was engaged at the time. The plaintiffs were cognizant of this fact. The boat was not to be confined to the limits of the State. How could the oath be taken in reference to this property, that the defendant was about to remove it from the State?

3. If this attachment is sustained it will have a very injurious effect on trade. The object of running a steam-boat and of trade can be defeated at the instance of a creditor, and great loss ensue. The very end and object is to keep the boat running. A cotton factor who sells cotton to a non-resident and takes his bill at four months, might as well attach and prevent the cotton from going out of the State, although he knew it was to be shipped to a foreign port, and was not to remain in the State until the bill fell due.—See case of *McClintock et al. vs. Cairnes et al.*, 5 Martin, N. S. 450.

Morphy, J. delivered the opinion of the court.

The plaintiffs are appellants from an order setting aside writs of attachment and sequestration obtained by them against the steam-boat *Rodolph* belonging to the defendant. These proceedings had been instituted about ten days before the maturity of a note of \$6420 62, drawn by defendant to their order in Vicksburg, and made payable on the first of March last, at the

EASTERN DIS. Merchants' Bank of the City of New Orleans. This note was
May, 1841.

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WILSON.

secured by mortgage on the boat attached. The parties to this suit are all non-residents; the plaintiffs residing in Kentucky, and the defendant in Mississippi. We have already had occasion to decide that the provisions of our Code of Practice as amended by the statute of 1826, authorize the issuing of an attachment in cases where both plaintiff and defendant reside out of the State, and where a debt is not yet due; 10 La. Rep. 447; but while we make this declaration, we cannot refrain from expressing the regret that our attachment laws have received such an extension. Its policy may well be questioned. Independent of the vast increase of litigation it creates in our courts to the delay and prejudice of the business of our own citizens, and the many vexatious and oppressive proceedings it gives rise to, such legislation tends materially to injure the true interests of the country in a commercial point of view; foreign merchants must surely feel some reluctance in sending their goods and merchandize within the limits of our State, or in placing funds in the hands of agents here for the purpose of purchasing the products of our soil, liable as their property is to be attached and subjected to sacrifice and heavy costs, for debts wherever contracted and however remote the period of their maturity.

The act of 1826, which declares that in cases where the debt is not yet due and the creditor swears his debtor is about to remove his property out of the State before said debt becomes due, "an attachment may issue," does not apply to Steam-boats and vessels, which from their nature must necessarily be taken from the State. In the present case we are of opinion that the boat was not liable to be attached before the note sued on became due. The expressions used in the statute of 1826, "*that the debtor is about to remove his property out of the State before the debt becomes due,*" must be understood as applying to property which the creditor might have supposed would not be carried out of the State, and to which he might have looked for his security at the time of contracting or since; but it would be unreasonable to extend them to a species of property which from its nature and destination must necessarily be taken out of the State, and which the creditors of the owner could not have believed would remain continually within its limits. To consider steam-boats and vessels in ordinary cases as coming within

the meaning of the statute of 1826 would be to declare at once that their owners are to be deprived of the free use of their property as long as they have any outstanding claims against them. If this exception is not written in the law, it must be implied, for it results from the nature and fitness of things, and is imperiously called for by the interests of trade. In applying a statute so much in derogation to the general principles of jurisprudence, we feel bound to give it such a construction, as will lessen the evils and inconvenience likely to flow from it.

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But in the present instance, it appears to us that the plaintiffs were bound in good faith to abstain from the proceedings they instituted before the maturity of their claim, even were they strictly legal. This boat appears to have been sold to defendant by the plaintiffs. It has been asserted in argument and not denied that the note sued on was given in part payment of the price; at all events it was secured by a mortgage on the boat; when this mortgage was taken by the plaintiffs, they well knew that this steamer was engaged in the Yazoo trade; it was not contemplated by either of the parties that she was to lie a whole year idle in the port of New Orleans; on the contrary, it must have been their mutual understanding that during all the time allowed for the payment of this note, the boat was freely to continue in a trade in which New Orleans was one of the *termini*, and Yazoo, in the State of Mississippi, the other. No fraud or intention to defraud is alleged, nor is there any reason given for these proceedings, except that defendant was about to remove his property out of the State. The plaintiffs might with the same propriety have attached the Rodolph the day after taking the note and mortgage. The evidence shows that when the boat was seized, she was taking in freight and was to have started that very day on one of her regular trips, that she had a return cargo engaged, and would in all probability have been back in our port at the time the note fell due. Not a tittle of evidence has been adduced to raise the suspicion that any thing unfair was in the contemplation of the defendant. If plaintiffs could attach or sequester the boat mortgaged be-

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May, 1841.

MONBOUCHET'S
CURATOR
vs.
FERRAUD FILS.

fore the expiration of the credit they agreed to give defendant, it is difficult to perceive why a cotton factor who sells a thousand bales of cotton to a non-resident for any European market, and receives his bill payable at a future day, cannot attach the cotton when about to be shipped on the ground that the debtor is removing his property out of the State. Such an unjust and faithless course of conduct could not be tolerated without a total disregard of the first principles of justice and fair dealing.

The judgment of the Commercial Court is therefore affirmed with costs.



MONBOUCHET'S CURATOR vs. FERRAUD FILS.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY
OF NEW ORLEANS.**

Every court has jurisdiction to compel obedience to its orders.

A purchasing creditor retaining the price, is bound to refund or pay over his share of the law charges of an insolvent estate.

Five days notice of the service of a rule, is sufficient to bring the party into court.

In this case the curator having filed his tableau of distribution, which was homologated, and in which it appeared the defendant was a purchasing creditor of property of the estate to the amount of \$2250, retaining the purchase money. His share of the law charges on the final administration of the estate, which proved insolvent, was \$443 25. The curator took a rule on him to pay over this sum, which was made absolute, and he appealed.

J. Seghers, for the curator and absent creditors.

Canon, contra.

Martin, J. delivered the opinion of the court.

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MONBOUCHET'S
CURATOR
vs.
FERRAUD FILS.

The curator's account of the administration of the estate of J. B. Monbouchet, having been filed and homologated, a rule was taken on the defendant and appellant to show cause why he should not pay into court the sum of \$443 25, with which he is charged in the above account. The rule was made absolute; he afterwards took a rule on the curator to show cause why the judgment against him should not be rescinded, and on this last rule being discharged, he appealed.

It appears that as a creditor by mortgage, he received a sum of \$2250, the proceeds of the sale of the mortgaged property. The estate proving insolvent he became responsible for the sum with which he is charged on the tableau, as his proportion of the law charges, &c.

He sought to set aside the rule which had been obtained against him, on an allegation that the Court of Probates was without jurisdiction, and that he had not proper notice of the rule.

I. It appears to us that the court correctly disregarded his pretensions. He had entered into an obligation to refund so much of the proceeds of the sale, which he had received, as might be needed to satisfy his proportion of the law charges which the estate was not sufficient to pay. Of this he was the mere depositary; for he would not have been permitted to receive any part of the proceeds of the sale, unless he had entered into the above obligation. This sum he holds subject to the order of the court, and must pay when the order is made requiring it. Every court has jurisdiction to compel obedience to its orders. He has made no objection as to the amount claimed.

A purchasing creditor retaining the price, is bound to refund or pay over his share of the law charges of an insolvent estate.

Every court has jurisdiction to compel obedience to its orders.

Five days notice of the service of a rule, is sufficient to bring the party into court.

II. The rule was taken returnable on the 27th of March, 1839, and was served on the appellant on the 22d, five days

EASTERN DIS. before the return day. This is sufficient notice to bring the
May, 1841. party into court.

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vs.
PAGE ET AL.

It is therefore ordered, adjudged and decreed that the judgment of the Court of Probates be affirmed with costs.

CHITTENDEN vs. PAGE ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

A lot of furniture under seizure is bought by an intervening party, who pays the *debt*, gives his note for the balance of the price, and takes the sheriff's receipt for the property on *storage*. *Held*, that it is a good sale and *delivery*. The possession was given by the officer, who afterwards as agent of the purchaser, takes it on storage.

This case grows out of a seizure of a lot of furniture. The plaintiff having obtained a judgment for \$742 against the defendant, Mrs. Maria C. Page, caused execution to issue the 20th November, 1840, which was levied on a lot of furniture, that had been previously attached and sequestered at the suit of Brower & Co., and was in the sheriff's store-house. It appeared in evidence that R. M. Bines, came forward and paid Brower & Co's debt, and took a sale of the goods from Mrs. Page, with Brower's consent, who released the seizure on being paid. The sale purported to be made for \$1000 in cash and the purchaser's note for \$1500. Bines took the sheriff's receipt for this furniture *on storage*. On the next day, the plaintiff levied his execution on the same furniture in the store-house, and gave the sheriff an indemnifying bond to sell it. Bines now intervened and made opposition to the seizure, basing his opposition on the sale of the property to him.

The plaintiff alleged this sale to be fraudulent and simulated, made to defraud creditors; and that no delivery of the pro-

perty had been made. The cause was submitted to a jury on this issue. A mass of testimony was taken and interrogatories propounded by the plaintiff to the intervenor, touching the fairness of the sale, &c.; which were fully answered, and went to the jury uncontradicted. There was a verdict and judgment for the intervenor, and the plaintiff appealed.

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May, 1841.

CHITTENDEN
vs.
PAGE ET AL.

Greiner, for the plaintiff and appellant.

Elwyn, contra.

Garland, J. delivered the opinion of the court.

The plaintiff being a judgment creditor of the defendant, on the 20th of November, 1840, issued his execution, which on the same day was levied on a large quantity of household furniture, which is claimed by the intervenor, who alleged, he purchased it on the 19th of November, 1840, for a valuable consideration, as will appear by a notarial act, filed with his petition of intervention.

The plaintiff denies, the intervenor is owner of the furniture; he says, if it ever was sold, it was not delivered before his seizure; that the sale was fraudulent and void, as the defendant was in insolvent circumstances at the time, to the knowledge of the intervenor; that he knew of the judgment, as he had once been summoned to answer, if he had not property of defendant's in his hands; that although \$1000 was paid in cash when the sale was passed, and a note given for \$1,500 more, yet it was all done for the purpose of defrauding him; that the money belonged to defendant, and the note was not to be paid; that the intervenor has no means whatever and defendant knew it, that the sale was made for \$2,500, whilst the property was worth upwards of \$5,000; that the intervenor has no family, keeps no boarding house, the property cannot be used by him as he is not engaged in trade, and the purchase will prove a loss to him, if he is in good faith; that defendant is to keep the boarding house and the purchase was made to assist her; and lastly, he has a privilege on a quantity

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of carpeting and other articles. In addition to all these allegations, the plaintiff propounded interrogatories to the intervenor to know where and how he obtained the \$1000 he paid, whether he got it from a bank, and what bank, whether he (the intervenor) owned any property in the city, and if so, what it was; whether it was not understood that defendant was to remain in possession of the property, and finally where his note is, and if he ever expects to pay it.

To these interrogatories, the intervenor seems to have answered with much good faith, that he borrowed the \$1000 from a friend and returned it in a few days after, as he got a note discounted in bank to repay it, that he has some promissory notes and furniture, also thirty eight lots of ground in the parish of Jefferson, which are paid for. That there was no understanding between him and defendant that the furniture was to remain in defendant's possession, that the sale was not made with the intention of defrauding plaintiff, but to assist defendant, who is, as he believes able to pay her debts as far as he knows any thing about them, but is temporarily embarrassed, and that he expects to pay the note he has given when it becomes due.

This suit is an instance of the trouble and difficulties a creditor may sometimes bring on himself, by pursuing a harsh and vexatious course towards his debtor. The demand of the plaintiff is for less than \$900, a person who appears to be entirely solvent, and proved to be honest, acknowledges he owes the defendant \$1,500, payable in one year. Yet in place of calling upon him in the manner prescribed by the act of the Legislature of 1839, the creditor pursues a course calculated to harrass all the parties and cast odium on them, without advancing his own interests. When he requested the sheriff to make a levy, that officer told him the property had been sold, yet he persevered and gave a bond to indemnify him, for seizing in the hands of a third person.

The evidence shows that Brower & Co. had an attachment and sequestration for about \$1000 against the defendant, the

intervenor agreed to purchase the furniture in possession of the sheriff and pay the demand, the defendant made a sale for \$2,500, Brower & Co. joined in it, received the \$1000 in cash, subrogated the intervenor in all their rights, and the same day, they and defendant requested the sheriff to deliver the possession to the purchaser, which he did, as appears from the receipt of Hozey, acknowledging he had received the furniture on storage. All this had taken place before plaintiff issued his execution. This delivery the plaintiff contends was not sufficient, and rests his case very much on it. Upon the evidence adduced, we think there was a sufficient delivery of the furniture. The seizure by the sheriff divested the defendant of all right of possession of the property, and when he with the assent of the defendant and intervenor, delivered it to the latter, by giving him a receipt as having received it on storage, the provisions of the law were complied with. La. Code, arts. 2452—53. The possession was given by the officer, and afterwards as an agent he received the furniture on storage.

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A lot of furniture under seizure, is bought by an intervening party, who pays the debt, gives his note for the balance of the price and takes the sheriff's receipt for the property on storage; Held, that it is a good sale and delivery. The possession was given by the officer who afterwards as agent of the purchaser, takes it on storage.

As to the sale being fraudulent on account of the known insolvency of the vendor, we think the allegation is not sustained. It is not shown the defendant owed any person but Brower & Co. and plaintiff. Their debts were less than \$2000. The sale was made for \$2,500, and plaintiff says, defendant's furniture was worth upwards of \$5000. The intervenor denies on oath in his answers to interrogatories that defendant was insolvent, and no effort is made to contradict him.

After the admissions that \$1000 in cash was paid as a part consideration of the sale, and a note for \$1,500 more executed; it is difficult to conceive an intention to defraud the plaintiff out of a debt of less than \$900, when the \$1,500 was more than sufficient to pay it. The intervenor says on his oath, he expects to pay that note at maturity.

It is proved that the intervenor is a clerk in a bank, at a liberal salary, that he has some property, and although the purchase he has made, may not prove a profitable one, we cannot on that account say the sale is fraudulent. The jury'

EASTERN Dis. upon hearing all the testimony, found a verdict for the inter-
May, 1841. venor, and we see no sufficient cause to disturb it.

LAILAW
vs.
TYSON.

The judgment of the Commercial Court is therefore affirmed with costs.

LAILAW vs. TYSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff as agent, agreed to furnish freight for a vessel at a certain rate and 5 per cent. primage thereon, and the freight was not received as agreed on; but the Captain made a new contract for freight to which the plaintiff was not a party: *Held*, that the latter cannot *charge* for the freight.

This is an action on a freight or commission account according to an agreement, and an account for \$889 annexed.

The defendant admits he entered into an agreement with the plaintiff by which the latter was to furnish a cargo of cotton for the ship *Normandie*, from Vicksburg to Liverpool at 15-16ths of a penny per pound freight, and 5 per cent. primage. The cotton was to be *pressed*; but when he arrived at Vicksburg, no pressed cotton was to be had, and he took unpressed cotton at a penny and one eighth per pound. He avers he has paid the plaintiff the greater part of his account and tenders him the balance, as he has heretofore done, of \$107 10, and prays to be dismissed with his costs.

There was judgment however, for the whole amount claimed, and the defendant appealed.

L. C. Duncan, for the plaintiff.

Strawbridge, contra.

Garland, J. delivered the opinion of the court.

The plaintiff claims "the sixteenth of a penny on the weight of the cargo of ship Normandie" from Vicksburg to Liverpool, being 667,035 pounds of cotton, also 13 per cent. premium for exchange on 173*l.* 14*s.* 1*d.* sterling.

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VS.
TYSON.

It appears that plaintiff chartered the ship to proceed to Vicksburg and take a cargo of cotton to Liverpool, for which he was to pay 15-16ths of a penny sterling per pound and 5 per cent. primage, for which the defendant was to pay him a commission of five per cent. on the freight. Although it is not mentioned in the written contract, it is clearly proved that it was understood the cotton was to be *compressed*. When the ship arrived at Vicksburg, no press was in operation and compressed cotton could not be obtained. The captain then made a contract with a merchant to take a cargo of cotton not compressed at the rate of a penny and one-eighth sterling per pound, and received the quantity stated, which he delivered in Liverpool. Under this last contract, to which the plaintiff was not a party, he claims the sum of \$889 24, whether as damages, or as being interested in the contract, the petition does not state.

We cannot in a legal or equitable point of view see what right he has to claim more than his commission of five per cent. on the freight, which the defendant is willing to allow. If the amount is claimed as having chartered the vessel, the answer is he was to furnish a cargo and did not comply with his contract at all; if the sum is claimed as the difference between the price contracted for originally and that paid, it can be as satisfactorily met, by reminding the plaintiff he was to furnish compressed cotton, the ship was obliged to take that which was not *compressed* and therefore took a less quantity, which was to be made up by the increased price of freight.

Where the plaintiff, as agent agreed to furnish freight for a vessel at a certain rate and 5 per cent. primage thereon, and the freight was not received as agreed on, but the captain made a new contract to which the plaintiff was not a party: *Held*, that the latter cannot charge for the freight.

If the plaintiff be entitled to any thing on the contract beyond his commission, it would be the difference between fifteen-sixteenths of a penny and a penny and an eighth per pound, but the whole evidence satisfies us he was acting as an agent to procure a vessel for the shippers at Vicksburg, and

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when she arrived there the principals had a right to make any change in the contract they pleased, which would not deprive him of the commission stipulated to be paid him. Upon a full examination of the case we do not think the plaintiff entitled to recover more than the sum the defendant acknowledges to owe and legally tendered him.

The judgment of the District Court is therefore annulled and reversed, and proceeding to give such judgment as in our opinion ought to have been rendered in the court below, it is further ordered and decreed, that the plaintiff do recover of and have judgment against the defendant, for the sum of one hundred and seven dollars and ten cents; the costs subsequent to the 12th of July, 1838, to be paid by the plaintiff as well as those of this appeal.

TYSON vs. LAIDLAW.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

It is not sufficient to prove the correctness of a charge, to show it is a custom in New Orleans; the law is more extensive than the customs of a city.

So the consignee of a vessel *inwards*, is not entitled to charge commission on the *outward cargo* as a customary charge, unless he actually obtains an outward freight.

This is an action to recover \$529 42, the amount of an account or balance due from the defendant to the plaintiff, as captain of the ship Montpelier, for freight collected on account of said ship.

The defendant claimed an item of \$234 90, for his commission on the *outward freight* for Liverpool; being on the freight of 967 bales of cotton. It appears the captain procured the

freight through other persons than the defendant, and without any objection being made. EASTERN DIS.
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There was judgment for the plaintiff and the defendant appealed.

TISON,
vs.
LAIDLAW.

Strawbridge, for the plaintiff.

L. C. Duncan, for the defendant.

Garland, J. delivered the opinion of the court.

The ship *Montpelier*, of which the plaintiff was master, from New York, was consigned to the defendant. He collected nearly all the freight for the inward cargo, retained his commission on it, and advertised the vessel as wanting a freight to Liverpool, though of this advertisement it does not appear the plaintiff had notice or that it was authorized by him. In the early part of the month of January, in the year 1838, the defendant engaged on freight for said vessel, five hundred bales of cotton at the rate of 5-8ths of a penny per pound, but before he notified the plaintiff of it, he had engaged a full cargo for the vessel with another house who stipulated that they should receive a commission of two and a half per cent. on the freight for furnishing the cargo, and that the vessel should be consigned to their correspondents in Liverpool. Of this arrangement, we infer the defendant had notice and assented to it, as he did not insist on the plaintiff taking the five hundred bales, and subsequently refused about six hundred more, saying the ship was full. The plaintiff paid the house that furnished the outward cargo, the commission agreed on, and when he wished to settle with the defendant for the freight of the inward voyage collected by him, he insisted on a commission of two and a half per cent. on the outward cargo also; this the plaintiff refused to pay, saying he (defendant) was not the consignee of the vessel for the voyage to Liverpool. The latter insisting on the charge for commission, this suit was brought on the account.

The defendant for answer says, that by the usage and custom of merchants in New Orleans he is entitled to charge the

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It is not sufficient to prove the correctness of a charge, to show it is a custom in New Orleans; the law is more extensive than the customs of a city.

So the consignee of a vessel inward is not entitled to charge commission on the outward cargo as a customary charge, unless he actually obtains an outward freight.

commission, and this is the sole question presented for our consideration. The case has been very briefly argued and the evidence is very meagre.

It has heretofore been decided, that it is not sufficient to prove the correctness of a charge to show it is a customary one in New Orleans; 1 Martin, N. S., 192; as the law merchant is more extensive than the limits of the city; yet there are doubtless some customs peculiar to every place, which when established make the law of the cases on which they operate.

It has further been held, that when a custom is relied on, it must be established by evidence, the private knowledge of the jury will not authorize a verdict without the proof; 4 La. Rep., 160; and custom cannot be regarded as law until a long and uninterrupted prevalence is proved; 7 Idem, 215.

The defendant has not shown the custom he alleges; on the contrary the only witness who testifies about it says, "They" (meaning his firm) "do not consider it the custom that vessels consigned to them inwards are bound to them for an outward freight, nor do they charge it unless they actually obtain an outward freight for them. It generally happens that masters of vessels do give their inward consignees a preference, but there is no obligation on them to do this; the two freights and voyages often being the subject of distinct engagements with different persons."

We do not think the defendant has made out his case; on the contrary he seems to have assented to the course of the plaintiff, as he never insisted on his taking the cargo he (defendant) had engaged, nor does it appear he ever informed him a part of the cargo was engaged. We do not think the defendant is entitled to the commission claimed.

The judgment is therefore affirmed with costs.

MONTILLY vs. HIS CREDITORS.

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May, 1841.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

MONTILLY
vs.
HIS CREDITORS.

In order to constitute a fraud, two conditions are necessary; there must be the *intention* of defrauding, and the event or actual loss sustained by the creditors, to deprive the debtor of the benefit of the insolvent laws.

Where the charge of fraud is made against a ceding debtor, in order that the court may judge of the *nature* and *extent* of the fraud, and to determine whether the *acts* complained of come within the purview of the law, they should be clearly and distinctly specified in the written opposition; general, allegations are not sufficient.

So where the allegations are mere matters of legal right, subject to be disputed and controverted in the *concursus*, they do not amount to a *fraud* against creditors within the meaning of the 22d, 23d and 24th sections of the act of 1817, and 10th section of the act of 1840, relating to insolvent debtors.

This case comes up on an opposition to the bilan and petition of the plaintiff, making a voluntary surrender of his property to his creditors, and praying for the benefit of the insolvent laws. The opposing creditor, Louis Lefebre, charges the insolvent with making a transfer of certain property to his wife on the eve of insolvency, in fraud of his other creditors, and of this opponent in particular; and that he had not made a correct and faithful statement of his affairs; and had produced no books in court. He prays leave to file his opposition, and that the insolvent be found guilty of fraud, and dealt with according to law; and that in the meantime he be arrested and held to bail.

The insolvent pleaded the general issue, and averred there was no fraud, but that he had made a fair and correct statement of his affairs, and negatived the charge of fraud in every shape.

Upon the issue thus made up, the cause was submitted to a jury; who returned a verdict sustaining the fraud: and after a strenuous attempt to obtain a new trial, from judgment confirming the verdict, insolvent appealed.

The facts of the case are simple and fully detailed in the opinion of this court.

Castera & Grivot, for the opposing creditor, contended.

1. The proceedings on a charge of fraud are not conducted

18L	383
44	19
18L	383
46	1178
18L	383
48	1344
48	1462
49	78

EASTERN DIS. with the same rigidity and strictness, nor on the principles of
May, 1841. criminal prosecutions. The party charging fraud, is only re-

MONTILLY quired to file his written deposition stating specially the facts
vs. on which he relies to maintain his charge.—Sec. 18, p. 429,
HIS CREDITORS. Moreau's Digest, vol. 2, which has been done in this case.

2. The transfer or dation en paiement by Montilly to his wife, was made, as appears by the evidence, with the intention to defraud his creditors; he was bound to show that it was passed in good faith; it was giving her an unjust preference, if she had any claim at all, and this is fraud.—See sec. 24, vol. 2, Moreau's Digest, p. 431. Montilly in his schedule states that he made this sale or dation en paiement, at a time when he did not expect so soon to sue his creditors; he shows therefore that he had an intention to make a cession of property.—The transfer or dation took place only one month prior to his failure.

3. The court properly rejected the paper purporting to be a judgment rendered about twenty two years ago in Paris, (France) in favor of Madame Montilly, against her husband; it was not properly authenticated.

4. A sale or dation en paiement can only be made between husband and wife in the three cases specified in the art. 2421, Civil Code. The heirs or creditors having always their rights protected. And in the suit now before the court it does not appear, that any of said causes existed at the time the sale was made.

5. Fraud is fully proven by the evidence on record, and nothing has been offered by Montilly to show that he acted in good faith.

6. The court did not err in admitting evidence to establish that Montilly made profits, and to establish the probable profits and losses made by him.

7. A party accused with fraud is bound to show the correctness of his acts. The acknowledgment of the husband in a contract of marriage of the receipt of monies, does not make proof against creditors. Proof conclusive must be adduced.

8. Judgment of separation of property between husband and wife is null and void, if not executed within fifteen days after judgment obtained. The laws of France are similar in that respect to ours.

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Soulé & Bodin, for the appellant.

1. By the law of 1817, nothing justifies the judgment rendered by the court on the verdict returned by the jury.

2. The law of 1840, applies only to cases where unlike the present, the insolvent has not made a voluntary surrender of property.

3. The 10th section of the act of 1840, as well as the 22d of the act of 1817, consider facts of the nature of those alleged in the present case as presumptive evidence of fraud; the intention of the parties to the act alleged as being fraudulent must be inquired into; there is, there can be no fraud unless the *malus animus* and the *eventus damni* be proved. In this case the titles of Mme. De Montilly, although, perhaps subject to exception if presented to support her title, could not be separated from the act of sale executed by her husband in her favor, they were necessarily *pars rei gestie*, the best evidence whereby the intention of the parties could be ascertained.

4. The insolvent, by the law of 1840, was entitled to the alternative either of submitting to the punishment inflicted upon him, or to exonerate himself thereof by paying the complaining creditor, and this alternative is denied him by the judgment *à qua*.

Simon, J. delivered the opinion of the court.

This is an appeal from a judgment rendered on the verdict of a jury declaring the petitioner guilty of fraud towards his creditors, in consequence of which, he was deprived of the benefit of the laws made for the relief of insolvent debtors, and condemned to be imprisoned for the lapse of one year.

On the 21st of December, 1840, the petitioner sued his creditors, and annexed to his petition a schedule of his affairs, the passive side of which contains the following statement:

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S. Mme. A. F. Montilly née Lévêque, ses droits dotaux et paraphernaux, ainsi qu'ils sont constatés par un acte chez J. Mossy, not. pub. en date du 30 Novembre dernier, montant à \$7264 56, sur laquelle somme j'ai donné en paiement \$2737 50. Balance \$4527 4. N. B.—Ce paiement à Mme. Montilly est fait au moyen de la vente d'un lot de terre et de trois esclaves dans un moment où je ne pensais pas devoir présenter un bilan sitôt. The cession of property was accepted by the court for the benefit of the creditors, and on the 13th of January, 1841, Louis Léfèbvre, a judgment creditor, carried on the bilan, filed his opposition, alleging several grounds of fraud, to wit: 1. That the insolvent has not made a true, correct and faithful statement of his affairs, has not surrendered all the property he possessed, and has not produced his books in court. 2. That on the 30th of November, 1840, by a public act passed before Jules Mossy, the insolvent made a sale or *dation en paiement* to his wife, of a certain lot and three slaves for the sum of \$2737, in part satisfaction and on account of certain pretended matrimonial rights, amounting altogether to \$7264 54, as specified in the notarial act; the whole of which transaction is fraudulent and collusive, and made with a view to defraud the insolvent's creditors; it is further averred that the pretended rights of the wife cannot be recognized by our laws; that if she obtained a judgment of separation of property against her husband in France, she must go there to exercise her rights; that the marriage contract of the parties was not made in conformity with our laws, nor with a view to reside in this State; that the judgment of the French tribunal cannot operate as a mortgage on property in Louisiana, unless duly recorded and recognized by our courts of justice; that the judgment of separation of property is null, because it never was executed by the real payment of the rights of the wife by authentic act on all the property belonging to the husband; that the act of sale in question was made to defraud the opponent who was then and is now a judgment creditor of the husband, and who therefore had acquired rights

upon his property; that the object of said sale was to give an undue preference to the insolvent's wife, and that by certain proceedings which took place after the passing of said act, the insolvent fraudulently intended to keep off the opponent's claim so as to allow his said wife to prescribe against the action which could have been instituted against her to annul the said act. The opposition concludes by praying that the insolvent be declared to be guilty of fraud and dealt with according to law; and that in the mean time he be arrested and held to bail.

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The insolvent was arrested as prayed for, gave his bond with good and sufficient security as required by law; and on the 8th February, 1841, he filed his answer to the opposition, denying the charges of fraud therein contained, and alleging that he always acted as an honest man; he further pleads a reconventional demand to the amount of \$5000, and prays that the opposition be dismissed, and for judgment in his favor against the opponent for the amount of his reconvention. The above-mentioned judgment was rendered against the insolvent on the verdict of the jury, and after having unsuccessfully attempted to obtain a new trial, he took the present appeal.

The first ground of opposition appears to us unfounded: the allegation that the insolvent debtor did not surrender all the property he possessed, unless set up in allusion to the property by him transferred to his wife, which will become the subject of our investigation on the second ground, is not supported by any evidence; and as he was not *a merchant or shop keeper*, in the true sense of the law, he could not be presumed to have kept any commercial books, which would exhibit the real situation of his affairs more fully than the schedule annexed to his petition. He however produced a book, which comes up with the record, and which appears to be the only one which he ever kept; and there is no evidence showing that he had any other book, except the vague testimony of witnesses who heard him speak of his books *in the plural*, without specifying what they were; but this, in our

EASTERN DIS. opinion, would not be sufficient to support an allegation of
May, 1841. fraud, even if he had been bound to produce them.

MORTILLY On the second ground of opposition, it is perhaps important
vs. to remark that the insolvent's wife was not made a party to
HIS CREDITORS. the suit, and that therefore the opponent cannot avail himself
of the provision contained in 14th section of the act of 1840.
The charge of fraud ought consequently to be limited to its
effect against the insolvent debtor; and we must consider it as
having been set up merely for the sole object of depriving him
of the benefit of the insolvent laws, and of subjecting him to
an imprisonment not exceeding three years.

In order to constitute a fraud, two conditions are legally necessary: there must be the intention of defrauding, *consilium fraudis*, and the event or the effective and actual loss sustained

In order to constitute a fraud, two conditions are necessary; there must be the intention of defrauding, and the event or actual loss sustained by the creditors, to deprive the debtor of the benefit of the insolvent laws.

by the creditors, *eventus damni*; if one of these requisites does not exist, there is no fraud; *Law 15, ff. quæ in fraud. credit. book 42, tit. 8. Vinnius, in sec. 6, instit. de act., No. 4, says, Ut hæc actio competat, requiritur, ut quid alienatum sit in fraudem creditorum; in fraudem autem alienatum hic accipimus, si et animum fraudandi debitor, et eventum fraudis habuerit; nam si alter utrum desit, et vel propositum fraudandi nullum fuerit, quod putaverit debitor se solvendo esse, vel CREDITORES RE IPSA ET EVENTU FRAUDATI NON SINT, HUIUS ACTIONI NON EST LOCUS.*

According to the 22d, 23d and 24th sections of the act of 1817, and the 10th section of the act of 1840, facts of the nature of those alleged in the opposition, are considered as presumptive evidence of fraud, subject however to be inquired into as to the true intention of the party against whom the fraud is alleged. Among the grounds of fraud, which may be set up against an insolvent debtor under the 22d, 23d and 24th sections of the said act of 1817, which acts of fraud are made the subject of the 7th section of the act of 1840, and are attempted to be made applicable to the present case; we find that all persons who shall be convicted of *having concealed* any of their property *with an intention* to keep them from their creditors; of having passed *sham deeds for the purpose* of con-

veying the whole or any part of their property, and *depriving* their creditors thereof; or of having *knowingly omitted* to declare any of their property in their schedules, *with an intent* to defraud their creditors; or of having *alienated, mortgaged* or *pledged* any of their property *to the prejudice* of their creditors; or of having within three months next preceding their failure, sold, engaged or mortgaged any of their goods and effects, or of having otherwise disposed of the same, in order to give *an unjust preference* to one or more of their creditors over the others, shall be considered as fraudulent bankrupts, and debarred from the benefit of the act.

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Where the charge of fraud is made against a ceding debtor, in order that the court may judge of the *nature* and *extent* of the fraud, and to determine whether the *acts* complained of come within the purview of the law, they should be clearly and distinctly specified in the written opposition; general allegations are not sufficient.

Now, in order to bring home to the debtor the facts of fraud on which the complaining creditor relies, and to give him a fair opportunity of disproving them; and also in order to enable the court to judge of the nature and extent of the fraud alleged, and to ascertain whether the acts complained of come within the meaning and purview of the law, it is necessary that they should be clearly and distinctly specified in the written opposition; general allegations are not sufficient.

In this case, what is the principal or material issue of fraud presented by the opposition? *That the insolvent within less than a month previous to his failure, sold and transferred certain property to his wife in payment of her pretended matrimonial rights.* The property remained in his possession, it was neither concealed nor put out of the reach of his creditors, and the debtor himself in laying before his creditors the statement of his affairs, apprized them frankly of the object of his act, so as to give them the means of inquiring into its validity, and of controverting the alleged rights of his wife, nay, it seems to us that his declaration in his bilan destroys any presumption of *intentional fraud*. The very terms of the opposition, which is merely predicated on points of law arising from the several acts on which the legal rights of the wife are based, and which are matters more properly to be litigated between her and the creditors, show that the controversy is not such as to be carried beyond the discussion of the contradictory rights

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of the parties, and that the insolvent's wife had gained nothing by the act complained of; since, from the schedule of her husband, she was still bound to establish her claims. It is not stated in the opposition that the property transferred was worth more than the price stipulated in the deed, and if it was, or if it was suspected that it had been transferred without consideration, the creditors were yet at liberty, under the disclosure made in the bilan, to compel the insolvent's wife to prove the legitimacy of her demands against her husband.

It has been strenuously urged that the deed of sale in question was passed with a view of giving to the wife *an undue preference* over the other creditors and particularly over the opponent: What preference? Surely, it cannot be pretended that by the act complained of she acquired any right of a higher dignity than she had before, there was no use in giving her any preference, as, supposing her claims to be really due, she was, as a married woman, entitled to be preferred to all the creditors named in the bilan, and her legal or tacit mortgage was for her a sufficient guarantee that, in case of her being able to prove the amount of her said claims, she would, by preference, obtain the full satisfaction of the sums due her by the insolvent, and exhaust the whole estate.

So where the allegations are mere matters of legal right, subject to be disputed and controverted in the *concurso*, they do not amount to a *fraud* against creditors within the meaning of the 22d, 23d and 24th sections of the act of 1817, and 10th section of the act of 1840, relating to insolvent debtors.

On the whole we are unable to perceive in the opposition any substantial fact of fraud, which, under our insolvent laws, were to be submitted to a jury; the allegations therein contained are mere matters of legal rights subject to be disputed and controverted in the *concurso*; in our opinion they do not come within the meaning and object of the above quoted sections of the laws of 1817 and 1840; and from the circumstances disclosed by the record, we are at a loss to conceive how the jury could find the insolvent guilty of fraud. The intention to defraud, *consilium fraudis*, far from growing out of the acts of the debtor, is at least very doubtful; and there has been no actual loss, *eventus damni*, experienced by the creditors who have yet the same right of objecting to the pretended claims of the insolvent's wife, in the same manner and with as

much advantage as if no deed of sale of the property had ever been passed.

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This view of the case makes it unnecessary to examine the bill of exceptions taken to the rejection of the papers and documents produced by the insolvent; but we cannot forbear noticing that the record shows that on the 6th of February, on a motion made by the opponent's counsel, the insolvent's wife was ordered to produce in court on the day fixed for the trial of the cause, (9th of February,) the very same papers, which, when offered by the appellant as being a part of the act complained of, were rejected by the court. The opponent who, in his opposition, had alluded specially to the said acts in support of his allegations of fraud, was certainly bound by the documents which he had called for, and his objection to their production ought perhaps to have been overruled.

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We do not think that this is such a case as ought to be remanded for a new trial on the allegations of fraud.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as, in our opinion, ought to have been rendered below; it is ordered and decreed that the appellant be discharged from the opposition made to his being entitled to the benefit of the laws passed for the relief of insolvent debtors; that the appellee's opposition be dismissed, and that this case be remanded for further proceedings in the *concurso* according to law, the said appellee paying the costs of his opposition and of this appeal.

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ORLEANS.

STATE,
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JUDGE OF
PROBATE COURT
OF
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AN APPLICATION FOR A MANDAMUS.

An appeal lies from the appointment of dative testamentary executors, by the Judge of Probates ; also from the appointment of syndics and curators of vacant estates.

This is an application for a mandamus to compel the Judge of Probates of New Orleans, to allow *an appeal* from an order of his court, appointing dative testamentary executors of the last will and testament of N. Girod, deceased.

When the olographic will of the late N. Girod was found and discovered to be without any executor, application was made to the Judge of Probates by two of the legatees to be appointed dative testamentary executors. Two near relations of the deceased also applied.

The Judge in the exercise of his power and discretion, appointed A. Gillet and A. Dreux, who were strangers to the deceased, and neither creditors or legatees. Wm. Freret, Mayor of New Orleans, and D. Prieur, legatees for a large amount, and who had applied for the dative executorship, prayed an appeal from this appointment. The Judge of Probates refused to grant it. He considered the power vested in him to appoint dative testamentary executors absolute, and that he had full and uncontrolled discretion over the same, without revision by appeal.

These parties being refused their appeal, applied for a mandamus to compel the Judge of Probates to allow it ; and accordingly a rule was taken on him to show cause why the appeal should not be granted.

Eustis & De Armas, for the application and rule.

Pichot & Buisson, showed cause to the contrary.

Garland, J. delivered the opinion of the court.

The olographic testament of the late Nicolas Girod having

been presented to the Court of Probates, the Judge ordered it to be registered and executed, and appointed Aimé Gillet and Adelin Dreux, dative testamentary executors. William Freret, Mayor of the city of New Orleans, and Denis Prieur presented their petition, asking an appeal to this court, which the Judge of Probates refused to allow; whereupon, they moved for a rule on the Judge to show cause why a mandamus should not issue, directing him to grant an appeal. The Judge appeared and stated twelve grounds of objection, why the rule should not be made absolute, only two of which we shall notice, the others presenting matters for consideration when the case shall come before this tribunal. The Judge first says, the Court of Probates has a discretionary power in the appointment of dative testamentary executors, which he is to exercise *ex officio*, and relies upon article 1671 of the Code. If by this, the Judge means he can appoint or not at his discretion, we think the law quoted does not sustain him, it says, "if the testator has omitted to name a testamentary executor, or if the one named refuses to accept, the judge *shall appoint* one ex-officio." This seems to leave no discretion at all; it is an imperative duty. But if the judge means the law gives him a discretion in the selection of the person, he then presents the question to be examined when an appeal shall be allowed. That we imagine is the point in controversy between the executors and the persons claiming the appeal.

The judge having assumed that the power is discretionary, further assumes that this court cannot control the decisions of the judges of the inferior courts in matters depending solely on their discretion. Having shown that the power given to the judge is not discretionary, we might stop here, but as he has referred to one of the early decisions of this court, *a dictum* which might seem to support the position assumed, we will examine the case cited from 3 Martin's Reports, 325. That was an application for a mandamus, to compel the judge of the first district to allow a cause pending before him to be tried by a jury. This court said, in a question of that description, it

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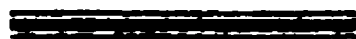
EASTERN DIS. would not exercise any control over the judge, until the case
May, 1841. should be decided and come up in the proper manner.

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An appeal lies from the appointment of dative testamentary executors, by the Judge of Probates; also from the appointment of syndics and curators of vacant estates.

In 4 Idem, 308, it was held an appeal would lie from a judgment confirming the nomination of a syndic. In the same volume, page 371, it was decided an appeal could be taken from the appointment of a curator to a vacant estate. Other cases of a character somewhat similar have long since been sanctioned by this tribunal. But supposing the power of appointment of dative testamentary executors to be discretionary, it was decided in 4 La. Rep., 111, that cases submitted to the discretion of a judge or court, are submitted to his legal discretion, and in the exercise of it, he is as liable to error as in any other part of his duty, and his errors are equally fatal to the rights of suitors; and consequently his decisions are subject to examination in this court; 4 Martin, 497.

It is ordered that the rule be made absolute.



GIROD'S Heirs and Legatees vs. GIROD'S Executors.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
 NEW ORLEANS.**

It is within the province of this court to inquire into the manner in which the Judge *a quo* exercises the *legal discretion* committed to him, whenever the party appears thereby, to suffer an *irreparable injury*.

The Judge of Probates has the faculty and power given him to appoint dative testamentary executors, but it is a faculty he is to exercise according to law, and not in accordance with his will and pleasure; appointing whom he pleases.

The beneficiary heirs are first entitled to be appointed dative testamentary executors, where the testator has failed to name any in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit, and according to the rules provided for the administration of such successions.

Where beneficiary heirs are appointed dative testamentary executors to a succession administered with the benefit of inventory, they are required to give security in the same manner as curators of vacant estates.

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Where strangers are appointed dative testamentary executors, by the Judge, disregarding the applications of heirs and legatees, the appointment will be annulled.

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The Mayor of a city, receiving a legacy *as trustee*, is not entitled to preference for the appointment of dative testamentary executor, as a legatee or creditor, of the estate. Persons who receive a legacy *in trust* for others, have no more right of preference than the agent of a creditor or stranger.

Notice of an application for the appointment of dative executor must be given in all cases, in the same manner as for curators or administrators of estates.

This case comes up on an appeal from an order of the Judge of Probates, appointing dative testamentary executors to the last will and testament of Nicolas Girod, deceased.

Jean François Girod, a near relation and heir at law of the deceased, presented his petition, alleging that an olographic will had been found and would be offered for probate and be made executory, but that there was no testamentary executor named therein. He prayed to be allowed the preference as a near relation and heir, and to be appointed the dative testamentary executor of said last will and testament. A. Guillet and A. Dreux, strangers to the deceased, also made application for the appointment, alleging they were *disinterested* and could give the necessary security. At the same time, Wm. Freret, Mayor of New Orleans, and D. Prieur also applied, stating that the former was legatee of N. Girod's succession, for a large amount *in trust*, and the latter in *his own right*; and that they were entitled to be preferred as dative testamentary executors.

The Judge of Probates gave the appointment to Guillet and Dreux:—Deciding that under the La. Code, art. 1671, if the testator failed to name an executor in the will, the duty and discretion devolved on “the Judge, *ex-officio*, to appoint dative testamentary executors, *ex parte*, in the free exercise of his discretionary power, without regard to the rules of preference laid down for the choice of curators.”

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From this order of the Probate Court, the petitioners, Jean François Girod, and Messrs. Freret & Prieur prayed an appeal, which was refused, until a mandamus issued.—See the preceding case of the State vs. Judge of the Probate Court of New Orleans, *ante* 392.

L. Janin & Pepin, for the appellant, J. F. Girod.

Eustis & Mazureau, for the appellants, Freret & Prieur.

Pichot & Castera, for the executors and appellees.

Simon, J. delivered the opinion of the court.

Nicolas Girod, one of the oldest and wealthiest inhabitants of the city of New Orleans, died on the first of September, 1840; his succession was supposed to be *intestate*, and accordingly two of his nearest relations and heirs were appointed the curators thereof. Some short time afterwards, an olographic testament was found, dated the 23d of December, 1837, to which were annexed a certain number of *Bons*, or written obligations in favor of the persons whom he had named in his will as his particular legatees for the several sums therein mentioned, amounting altogether to \$710,000; but the testator had failed to appoint any testamentary executor.

On the 23d of January, 1841, Jean François Girod presented a petition to the Court of Probates, in which he represented that he had been informed that the deceased's will would soon be offered for probate; that it would be necessary to appoint one or more dative testamentary executors to the same, and that being an applicant for the said appointment, he would, if appointed, furnish the security required by law; he also averred that with the exception of his brother, Pierre Nicolas Girod, whose rights were equal to his own, he was the nearest relative to the testator, and entitled to a greater portion of his estate than any other person. On the 25th of the same month, William Freret, mayor of the city of New Orleans, and Denis Prieur, two of the legatees, made application to the Court of

Probates, for the purpose of having the said Will admitted to probate and ordered to be executed, and prayed in their petition to be appointed dative testamentary executors with the seizin of the succession. On the same day, two petitions were presented to the Probate Court by Aimé Guillet and Adelin Dreux, representing themselves to be entirely *disinterested* in the succession, and praying also to be appointed dative testamentary executors. On the 30th, William Freret and Denis Prieur renewed their application for the appointment of dative testamentary executors; and Pierre Nicolas Girod filed his petition for the same purpose, being one of the legal heirs of the deceased; and on the same day, the Judge *a quo*, conceiving that he had a right under the *art. 1671 of the Louisiana Code* to appoint dative testamentary executors *ex parte* and *ex-officio*; whence, as he says, it follows that he, the Judge, has the free exercise of a discretionary power without regard to the rules of preference laid down for the choice of curators; and believing that the exercise of such discretionary power did not admit of any discussion before him among the *candidates* for the trust, whom, therefore, he did not think proper to hear contradictorily; ordered that Aimé Guillet and Adelin Dreux be appointed joint dative testamentary executors of the last will of the deceased, on their complying with the requisites of the law. From this judgment, Jean F. Girod, William Freret and Denis Prieur appealed.

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We have very lately had occasion, on a rule for a mandamus, and supposing the power of appointment of dative testamentary executor to be discretionary under the *art. 1671* of the La. Code, to express our opinion on the nature and extent of the discretionary power given by law to the inferior Judge, which he had even assumed and carried so far as to refuse an appeal to this court from the judgment now under consideration; and in accordance with the doctrine repeatedly recognized in our jurisprudence; we again held that it was within the province of the Supreme Court to inquire into the manner in which the Judge *a quo* exercised the discretion; (a

It is within the province of this court to inquire into the manner in which the Judge *a quo* exercises the legal discretion committed to him, whenever the party appears thereby to suffer an irreparable injury.

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sound and legal one) committed to him, whenever the party appears thereby to suffer an irreparable injury. But the question now presents itself whether under the law above quoted, and others on the same subject, it is true that the power or right of appointing dative testamentary executors is really and *exclusively* within the discretion of Courts of Probate, and that those courts are not to be governed by any of those rules which give to applicants for the same appointment a right of preference over each other? or in other words, has the Judge of Probates the power of selecting and *ex parte* appointing whomsoever he pleases as dative testamentary executor?

The *art.* 1671 of the La. Code, relied upon by the appellees, and by virtue of which the inferior Judge appears to have made the appointment in question, is in these words: "if the testator has omitted to name a testamentary executor, or if the one named refuses to accept, the Judge shall appoint one *ex officio*." This law gives clearly to the Judge the power of appointing a dative testamentary executor, whenever it becomes necessary to do so in the cases therein pointed out, but we cannot construe its meaning in a more extensive sense than as merely conferring upon him a faculty which he is to exercise according to law; and if so, how can it be pretended that it gives him the power of appointing any one at his pleasure, and of disregarding the rights of those who had laid before him their applications and who had shown themselves entitled to be preferred to others in obtaining the appointment. This would be more than the exercise of a mere legal discretion; it would be the action of an arbitrary power which the law has never had in contemplation, and which our courts ought not to sanction.

The Judge of Probates has the faculty and power given him to appoint dative testamentary executors; but it is a faculty he is to exercise according to law, and not in accordance with his will and pleasure, appointing whom he pleases.

This construction of the law leads us to the inquiry whether among the applicants, any of them is entitled to a preference over the others; and whether the judge *a quo*, could, in exercising the legal discretion vested in him by law, appoint persons who are strangers in interest to the succession, whilst there were other applicants having an interest in it, as heirs or

legatees? By the *art. 924, secs. 7 and 8 of the Code of Practice*, Courts of Probate have the power "to appoint *administrators under the will*, when the executor appointed by the testator will not or cannot perform the duties, or is dead or absent; and to remove or supply the places of such tutors, curators, and *testamentary executors*, in the cases provided by law." These provisions, which ought to be construed with reference to the *art. 1671*, show the extent of what the lower judge calls *his discretionary power*, which is nothing more than the right or faculty of appointing; and demonstrate clearly the true intention of the legislature. The sole object of the law maker was merely to provide for the administration of testamentary successions, where the testator has failed to name an executor, or where the one appointed in the will refuses to accept, is dead or absent, or has been removed from office; in such cases, the person who is appointed by the judge *ex officio*, (which expressions, *ex officio*, are only used in contradistinction to those appointments which are made by the judge with the advice of a family meeting or of a meeting of creditors;) acts as administrator under the will, or is otherwise called, dative testamentary executor; the name is immaterial, as the law indicates sufficiently their powers and duties, which under both provisions, are purely those of an administrator.

It is important and proper to remark here that although the succession of Nicolas Girod is a testamentary one, yet his legal heirs being entitled to the benefit of inventory, his estate will necessarily be subject to be administered under such benefit, according to the rules and in the manner provided for by law for the administration of such successions, *La. Code, art. 971*. Therefore, the administrator under the will, or otherwise called dative testamentary executor, will unite the powers and duties of both, under the control and superintendence of the Court of Probates. If it be true that the heirs of the deceased are entitled to the benefit of inventory, they cannot be deprived of the right of administering the succession according to the rules contained in the articles of the Code relative to this subject;

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The beneficiary heirs are first entitled to be appointed dative testamentary executors, where the testator has failed to name any in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit, and according to the rules provided for the administration of such successions.

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and if so, under the *art. 1035*: “the preference, in the choice of the administrator, must be given to the beneficiary heir *over every other person*,” and according to the *art. 1039*, “if there be neither beneficiary heir, &c., &c., who will or can accept the administration or give the necessary securities, it shall be given to one or two of the creditors, whom the judge shall choose, &c.” The heirs of the testator have therefore a particular interest in the good administration of the testamentary succession of Nicolas Girod, and we are unable to perceive any valid reason why the circumstance of there being a will, the object of which is merely to make certain legacies which are to be paid out of the estate, and which are to become the debts of the heirs, if they accept; should alter their situation, and should have the effect of divesting them of their legal right to obtain the administration of the estate, whether it be under the denomination of *administrator* or of that of *dative testamentary executor*; the formalities to be observed, and the responsibilities and securities to which they are subjected are the same; their interest is also the same, and *ubi eadem est ratio, eadem est lex*. We think therefore that the heirs of the testator ought to be entitled to exercise the same right of preference in this case over any other person in the appointment of a dative testamentary executor, as is allowed to them by law in the cases of vacant estates or of successions taken with the benefit of inventory.

But it has been urged that if the heirs were to obtain the appointment, they would be interested in not executing the will, or at least in delaying the payment of the legacies: this argument would as well apply to the heir who claims the administration of a vacant estate or of a succession taken under the benefit of inventory, and yet, in those cases the law gives them a positive right of preference; *La. Code, arts. 1035, 1114*; the heir would be as much interested in not paying the debts of such estates, as in not paying the legacies of a testamentary succession: but in all these administrations, the law has provided against the infidelity of the administrators, by requiring

them to give security; and in this particular case, the security must be given in the same manner as curators of vacant successions; *La. Code, art. 1672*. Generally speaking, there would certainly be as much danger, if not more, in putting the estate in the hands of disinterested strangers, as there is in permitting the heirs, or any one of them, to manage their own affairs; nay, it is obvious that unless excluded by law, they should have the preference.

With this view of the question, we must conclude that, as the record contains evidence that one of the appellants, Jean François Girod, is a near relation and one of the heirs of the testator; and that the other applicants, William Freret and Denis Prieur are legatees, and therefore creditors of the estate; the judge *a quo* erred in disregarding their applications, in refusing to hear them contradictorily with the appellees, and in making the *ex parte* appointment of persons who have not shown themselves in any manner legally entitled to the trust, in preference to the appellants. The appointment complained of, must therefore be annulled and set aside.

We must not be understood, however, as meaning or intimating that the Mayor of the city of New Orleans, who, *as trustee*, is to receive the legacy contained in the testator's will for the purposes therein mentioned, will, by virtue of the said legacy be entitled to any right of preference as a legatee or creditor of the estate; this right properly belongs to the legatees for whose personal benefit the dispositions are made, and who are therefore directly interested in the good administration of the succession. We do not think that any municipal officer or any other person who is to receive a legacy *in trust for others*, has any more right of preference in the appointment of a dative testamentary executor than the agent of any creditor or any other stranger may have.

A last question has occurred, whether it is necessary to give public notice of the applications made for the appointment of dative testamentary executor: the law is silent upon this subject, but we are inclined to believe, according to the principles

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Where beneficiary heirs are appointed dative testamentary executors to a succession administered with the benefit of inventory, they are required to give security in the same manner as curators of vacant estates.

Where strangers are appointed dative testamentary executors, by the Judge, disregarding the applications of heirs and legatees, the appointment will be annulled.

The Mayor of a city, receiving a legacy *as trustee*, is not entitled to preference for the appointment of dative testamentary executor, as a legatee or creditor of the estate. Persons who receive a legacy *in trust* for others, have no more right of preference than the agent of a creditor or stranger.

Notice of an application for the appointment of dative executor must be given in all cases, in the same

EASTERN DIS. above established, that as this kind of administration is in every
May, 1841. respect to be assimilated to that of curator or administrator, it
CASSIDY is equally proper that notice should be given to all those who
vs. may wish to make opposition thereto; the reasons are the
HIS CREDITORS. same, and this requisite will be in accordance with the true
 manner as for object of the law. We are therefore of opinion that in all
 curators or ad- cases of administrators of successions of whatever denomina-
 ministrators of tion, to be appointed by Courts of Probates, public notice of
 estates. the applications should be given in the manner pointed out in
 the articles 1106, 1107 and following of the Louisiana Code or
 in any other law relative to the same subject.

It is therefore ordered, adjudged and decreed that the judgment of the Court of Probates be annulled, avoided and reversed; and that this case be remanded for further proceedings according to law, with instructions to the judge *a quo* to proceed to the appointment of one or more dative testamentary executors of the last will and testament of Nicolas Girod, deceased, under the legal principles and rules above laid down; the appellees paying the costs of this appeal.

CASSIDY vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The word "*deposition*," in the 18th section of the act of 1817, relating to voluntary surrenders of property, is a mistranslation or misprint from the French text; and it evidently means "*opposition*."

Where the capacity of a person acting as executor is not denied, there is no necessity of producing the authority or evidence of capacity.

An attorney in fact need not state, that he knows the existence of a debt sworn to by him, from his *personal* knowledge, when he is not questioned as to the manner in which he derives his knowledge.

An attorney may represent his constituent at a meeting of creditors, even when she is present in the city, where the meeting is held.

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The plaintiff having filed his bilan and petition, praying for the benefit of the insolvent laws, W. J. Moffatt was appointed a provisional syndic. At the meeting of creditors, P. Riviere was chosen syndic, who took a rule on the provisional syndic to hand over the property, effects, &c. of the estate of the insolvent. Moffatt filed his opposition to the appointment of Riviere as syndic, alleging himself to be a privileged creditor, and setting out various grounds of opposition, which are detailed in the opinion of this court by Judge Martin, and need not be recapitulated. An affidavit was annexed to the petition and opposition averring the declarations contained in it were true. There was judgment overruling it; and the opposing creditor appealed.

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Greiner, for the opponent and appellant.

Grivot, contra.

Martin, J. delivered the opinion of the court.

Moffatt, provisional syndic of the insolvent, is appellant from a judgment ordering him to render an account of his administration as provisional syndic; and also to deliver into the possession of P. Riviere, syndic, the slave and other property, real and personal, which he has or may have in his keeping, belonging to the estate of James Cassidy, the insolvent. He is also appellant from a judgment overruling his opposition to the appointment of Riviere as syndic.

If Riviere was duly appointed syndic, the order to the provisional syndic to account and deliver up the property, &c. was the necessary consequence of his appointment. We have therefore only to inquire whether the opposition was properly overruled.

The appellee's counsel has contended, that the opposition was properly overruled, because it was not accompanied with a sufficient affidavit. The opposition was made under the 18th

EASTERN DIS. section of the act of 1817, relating to voluntary surrenders ; 2
May, 1841. Moreau's Digest, 429, in which there is an evident discrepan-

CASSIDY
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HIS CREDITORS. cy between the English and French texts ; the former requiring the opponent to lay before the court his written *deposition*

The word "deposition" in the 18th section of the act of 1817, relating to voluntary surrenders of property, is a mis-translation or misprint from the French text ; and it evidently means "*opposition*." stating specially the several facts of nullity, &c. to the appointment ; while the latter states, "*remettre à la cour, saisie de la faillite son opposition par écrit, établissant spécialement les divers faits de nullité.*" In comparing the different sections of this act, especially the 26th and subsequent ones, with the one under consideration, we come to the conclusion that the discrepancy evidently proceeds from a mistranslation of the French text, which appears to us to have been the original one ; a *lapsus calami*, or a misprint.

On this branch of the case, the opposition ought to have been sustained, on the grounds on which it rested or was based.

1. The opponent denied that Riviere received the legal number of votes either in number or amount, to constitute him syndic.

2. He alleged that the vote of Mrs. Bancker was improperly received, as it was not shown that she was testamentary executor of her husband, and could give no authority to her attorney to give the vote.

3. That the oath of the attorney in fact does not state that it is from his personal knowledge that he knows of the existence of the debt ; and his oath ought not to have been received, because his constituent was in the city, and could not vote by proxy.

4. That the insolvent placed his landlord Bancker on his schedule, for the whole amount of a lease which had not expired ; and consequently for a larger sum than was due to him.

Where the capacity of a person acting as executor is not denied, there is no necessity of producing the authority or evidence of capacity. That at the time of voting for syndic, there was no rent due to the estate of Bancker, and that this vote should not have been given, by which alone Riviere was elected.

I. The first ground of objection is not supported by any evidence.

II. In relation to the second ground, Mrs. Bancker's capacity as executrix not being denied at the meeting of creditors, there was no necessity of the production of her letters testamentary to authorize her attorney to vote for syndic.

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III. The attorney in fact of Mrs. Bancker, not having been questioned as to his personal knowledge of the existence of the debt, sworn to by him, he had no need to state it. An attorney in fact may represent his constituent at a meeting of creditors, although the latter be present in the city, if she finds it inconvenient to attend at the notary's office.

An attorney in fact need not state, that he knows the existence of a debt sworn to by him, from his personal knowledge, when he is not questioned as to the manner in which he derives his knowledge.

IV. None of the grounds of opposition are established by evidence, so that this one, with the rest, must fall.

The Judge *a quo*, correctly overruled the opposition to the appointment of Riviere as syndic.

An attorney may represent his constituent at a meeting of creditors, even when she is present in the city where the meeting is held.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

LEE & HARDY vs. PALMER ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A garnishee has no right to interfere with the merits of the case between the plaintiff and defendant.

When the plaintiff once obtains judgment against the defendant, all that is required is to obtain an order on the garnishees to pay over the funds of the defendant in their hands.

The initials of a name, or the name at length of a person, marked on bales of cotton, is strong evidence of ownership.

This is an attachment suit instituted the 25th of February, 1840, against the defendant, John E. Palmer, in which the plaintiffs claim a judgment on his note for \$6833 43, with 8 per cent. per annum interest thereon, payable the 25th of

EASTERN DIS. March, 1839, at the branch of the Union Bank of Mississippi,
May, 1841. at Lexington. They pray for attachments against property in
 the hands of Ward, Moffitt & Co., in New Orleans, and S. S.
 Cobb & Co., who are also cited as garnishees.

Cobb & Co., answered they had no property or money of the defendant, Palmer, in their possession or under their control at the time of the service of the attachment, but that they had 89 bales of cotton marked "J. E. Palmer," shipped to them by other persons and on other account. Ward, Moffitt & Co. answered that they had no property or money of Palmer, so far as they knew; but they had in their possession 115 bales of cotton, marked "J. E. Palmer," which was shipped to them from Mississippi, "*by, for and on account* of Elliott & Worley, Merchants," in that State. They say they do not know Palmer and are not aware that they have any property of his in their possession.

On the 23d of April, 1840, Elliott & Worley intervened, claiming the cotton in question with a privilege thereon. The plaintiffs opposed a general denial to the demand of the intervenors.

On these pleadings and issues the parties went to trial the 8th of June following. The plaintiffs made out their case against the defendant, and had judgment; reserving the privilege of the intervenors until the trial of the intervention.

On the 2d of July, 1840, the plaintiffs took out execution on their judgment; and levied it on the property attached in the hands of the garnishees. The return was made the 14th of September, 1840.

On the 7th of December, 1840, the intervention came on for trial, when after producing evidence on both sides, the counsel for the intervenors discontinued the intervention. On the 16th of December, the plaintiffs took a rule on the garnishees, Ward, Moffitt & Co. and S. S. Cobb & Co., to show cause within ten days why they should not pay over the respective amounts in their hands towards the satisfaction of plaintiff's judgment.

Ward, Moffitt & Co. failed to answer, and judgment was rendered making the rule absolute. EASTERN DIS.
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No property having been found or seized, the plaintiffs, on the 22d January, 1841, took another rule on Ward, Moffitt & Co., to render an account of sales of the 115 bale of cotton attached in their hands and pay over the proceeds. They answered and exhibited an account of sales of said cotton, received by them as consignees of Elliott & Worley, and denied that the defendant, Palmer, was the owner, or that said cotton was ever attached in their hands as his property; relying on their answers as garnishees, they pray to be dismissed. LEE & HARDY
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On the 29th of January, Elliott & Worley renewed their intervention, alleging that the cotton in question "was delivered to them in consideration of the advance to him of certain monies by them." They pleaded a general denial; and denied specially that the plaintiffs' had any claim on the cotton or its proceeds whatever.

On the 15th of February, 1841, one day before the final decision on the rule, Elliott & Worley filed their affidavit, alleging that the testimony of certain witnesses in Mississippi was material to them, and that they could not safely go to trial without this testimony; applying at the same time for a commission. On the following day, on motion of the plaintiff's attorney, and "on showing that Ward, Moffitt & Co. had confessed in their answers that they have in their hands monies to the amount of \$2733, belonging to defendant," judgment was rendered making the rule absolute and ordering them to pay over to the plaintiffs said sum of money. From this judgment they appealed.

Wharton, for the plaintiffs, insisted on the affirmance of the judgment.

Chinn, for the appellants, (Ward, Moffitt & Co.) made the following points:

1. The inferior court erred in rendering judgment for the plaintiffs.

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2. Judgment should have been rendered for the defendants in the rule.

3. The defendants were not before the court, and the proceedings were *ex parte, coram non judice*, and void.

4. There was no evidence in the cause to authorize any judgment against the defendants.

5. The proceeding was, by motion of plaintiffs, without citation or notice to the defendants, and therefore erroneous.

6. The court erred in rendering judgment against Ward, Moffitt & Co., pending the opposition of Elliott & Worley, which should have at least been first disposed of.

Garland, J. delivered the opinion of the court.

This suit was commenced by attachment; the plaintiffs alleging the defendant is indebted to them in the sum of \$6,833 43, with interest at eight per cent. from the maturity of the note. S. S. Cobb & Co., and Ward, Moffitt & Co. were cited as garnishees. The sheriff in his return on the attachment, says, he has seized sufficient property in their hands belonging to the defendant, to satisfy the debt, but does not say what it is. In their answers to the interrogatories propounded by the plaintiffs, Ward, Moffitt & Co. say they have no knowledge of the defendant, and they have no property of his of any value, nor are they indebted to him, nor have they ever had any transaction with or knowledge of him. They further say, they have in their possession one hundred and fifteen bales of cotton, marked J. E. Palmer, which was shipped to them by and for and on account of Elliott & Worley, merchants of Mississippi, and they suppose the plaintiffs have been misled by the cotton of Elliott & Worley having the name of Palmer on the bales.

On the 23d of April, 1840, nearly two months after these answers were filed, Elliott & Worley intervened and claimed the cotton as their property. On the 8th of June following, the cause came on for trial, when there was a final judgment against the defendant for the full amount of the note, the rights

of the intervenors being reserved for future investigation. On this judgment an execution issued, on which the sheriff returned that he had again levied on all the rights of the defendant in the hands of the garnishees. Early in December last, the claim of the intervenors came on for trial, when R. Moffitt, one of the firm who had answered the interrogatories, was sworn as a witness, and then stated that both Elliott & Worley had told him they had not purchased the cotton of Palmer, but had only made advances on it, but how much, neither of them could tell, as they had no statement of the amounts about them. Worley said that the proceeds of the one hundred and fifteen bales of cotton in possession of witness's house, would about clear them, but Elliott came down sometime after and said the advances would take all the cotton both in the hands of witness and Cobb & Co. A good deal of testimony was taken on the trial, but the intervenors did not offer the slightest evidence they had purchased the cotton or advanced a dollar on it. It was proved they were forwarding merchants at Tchula, Mississippi, and the bill of lading is filed, in which it appears that this cotton was shipped with several other lots to the appellants, to be delivered on their paying freight at the rate of \$1 75 per bale, and \$70 20 for charges. On the margin of the bill is written, "all for account of Elliott & Worley." On this trial, a letter from the original defendant was received as evidence, in which he expresses surprise at his cotton being attached, and says Elliott & Worley have made an advance on it, but does not say how much. The trial terminated by the intervenors discontinuing their claim.

A few days after this dismissal, the plaintiffs took a rule on the garnishees to show cause within ten days, why they should not pay over to them all the monies in their hands, to be applied to the satisfaction of the judgment obtained by the plaintiffs against the defendant. To this rule, Ward, Moffitt & Co. made no answer, and it was made absolute on the 15th of January, 1841, and they were adjudged to pay "the plaintiffs the amount of money in their hands towards the satisfaction of

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EASTERN DIS. the judgment obtained by plaintiffs against defendant." S. S.
May, 1841. Cobb & Co. were also decreed to pay over the amount in their
LEE & HARDY hands, with which judgment it is said, they have complied.
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PALMER ET AL. Ward, Moffitt & Co. appear to have paid no attention to the
judgment against them, whereupon, the plaintiffs, on the 22d
of January, 1841, took another rule on them requiring them
within three days to file a statement of the number of bales of
cotton attached in their hands, as the property of the defen-
dant, Palmer, or if they have sold said cotton, then a detailed
account of the proceeds. For answer to this rule, they exhibit
an account of sales of the cotton amounting to \$2,733 91,
which they say they received as consignees of Elliott & Worley.
They deny that Palmer is the owner of the cotton, they deny
it was attached in their hands as his property, and relying
upon their previous answers to interrogatories, they pray to
be dismissed. On the 29th of January, 1841, three days after
the filing of this answer, Elliott & Worley again intervened in
the case, not claiming the cotton as their property but alleging
they had made advances on it, and have a higher privilege on
the proceeds than the attaching creditor. They are not yet
able to state the amount of their advances, but say they are
over \$6000, and they have lost the receipt given for the
amount, but hope to find it at some future day. They speak
of an affidavit as to the verity of their allegations, the giving
of a bond and praying for an injunction, but they never have
made the affidavit, filed the bond or obtained the injunction,
and their petition of intervention stood over without any effort
on their part to obtain evidence to sustain it, until the day
previous to the trial of the issue between the plaintiff and gar-
nishees; when one of the intervenors made an affidavit that he
had material and important witnesses residing in Mississippi,
without whose testimony he could not go to trial, yet he does
not name any person or say what he expects to prove by them,
and there his efforts seem to have ended. On the 16th of Fe-
bruary the case was tried, and the District Judge gave judg-
ment for the plaintiffs, from which the garnishees appealed.

In this court their counsel has made numerous points to obtain a reversal of the judgment. EASTERN DIS.
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His two first grounds, that the inferior court erred in giving judgment in favor of the plaintiffs and against the defendant, is answered by a reference to the well settled decisions of this court, that a garnishee has no right to interfere with the merits of the case, between plaintiff and defendant; 10 Martin's Rep. 568. LEE & HARDY
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A garnishee has no right to interfere with the merits of the case between the plaintiff and defendant.

Upon the third and fifth points, which allege that the proceedings against them are *ex parte*, upon the mere motion of the plaintiffs, without citation or notice, and therefore null and void; we have to remark, in relation to the first rule, the sheriff says in his return, that he served it on J. W. Ward, one of the firm of Ward, Moffitt & Co. they did not choose to appear; as to the second, we do not find any citation, but the parties appeared and answered it, without objecting to a want of notice in the form of proceeding. On that rule, a trial took place, and the appellants were condemned to pay the money. We see no error in the proceedings of the court. The plaintiffs had a judgment against their original debtor; he did not complain of it, and all that was necessary, was to obtain a judgment or order to direct and authorize the garnishees to pay over whatever they had in their hands. When the plaintiff once obtains judgment against the defendant, all that is required is to obtain an order on the garnishees to pay over the funds of the defendant in their hands.

The fourth point is, there was no sufficient evidence to authorize a judgment against the appellants. It is difficult to conceive what better evidence could be obtained. It was held in the case of Robinson et al. vs. Taylor et al., 6 La. Rep. 397, that the initials of the name of a party being on bales of cotton, was a circumstance, having weight in a question of ownership. If that be correct, and we think it is, the fact of a man's name at full length on the bales is a circumstance entitled to much more weight. The claim of the intervenors alleging a right of property, had been dismissed, principally on the evidence of Moffitt, and no right could be shown although the claimants had nearly eight months to procure the testimony, which if it exists must be in their section of the The initials of a name, or the name at length of a person marked on bales of cotton, is strong evidence of ownership.

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country. The appellants knew the intervenors had no right of property to the cotton, but only a claim of privilege, of which not the least evidence has been produced. The counsel contends we cannot look into the evidence of Moffitt given on a former trial to charge him in this. He does not appear to have objected to its use in the inferior court, nor has he shown us any law commanding us to close our eyes upon those admissions made under oath.

The last ground is, that the court erred in giving judgment against the garnishees whilst the intervention was pending. The Code of Practice, art. 389, informs us that an intervention is permissive, and it must not retard the trial of the principal cause. The intervenors must be always ready to plead and exhibit their testimony; art. 391. In this case, we do not find the intervenors endeavoring to delay the trial, or complaining of the judgment rendered against the garnishees; but they (the garnishees) manifest a most lively sensibility for these third parties, and endeavor to interpose them to avoid the payment of a sum of money that they do not pretend belongs to them, and which they have had more than a year without interest.

We have noticed in a number of the attachment cases that have come before us, that much of the litigation is to be traced to the garnishees; for what purpose, is not difficult to discover. We think it time to let it be known, that these manœuvres have not escaped our observation, and we shall, as far as our powers go, use them to repress such practices.

The judgment of the District Court is therefore affirmed with costs, and ten per cent. damages.

BEACH ET AL. vs. OAKLEY.

**EASTERN DIS.
May, 1841.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**BEACH ET AL.
vs.
OAKLEY.**

Where answers to interrogatories make out the plaintiffs' case, and are not disproved, he will have judgment.

This is an action on a promissory note of the defendant for the balance due after allowing a credit.

The defendant averred that after maturity of said note he had placed several promissory notes in plaintiffs' hands out of which to make the money, and in consequence thereof they agreed not to bring suit. He then propounded a string of interrogatories touching this matter, which plaintiffs promptly answered, showing that the notes deposited so far as collected had been credited, and that the balance the defendant promised to pay repeatedly but had failed.

There was judgment for the plaintiffs and the defendant appealed.

Benjamin, for plaintiffs, prayed the affirmance of the judgment with ten per cent. damages.

F. B. Conrad, contra.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment for the balance due on his promissory note. He did not deny his signature, but made an unsuccessful attempt, by propounding interrogatories to the plaintiffs, to establish a promise of the latter not to institute a suit on the note, on a certain consideration.

The plaintiffs, in their answer, negative the facts set forth in the interrogatories and relied on by the defendant to make out his case, and aver they have given all due credits on the notes. The defendant not having attempted to disprove the answer of the plaintiffs to the interrogatories propounded, judgment was correctly given against him for the balance due on the note.

EASTERN Dis. It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs and ten per cent. damages.
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vs.
TWOGOOD ET AL.

BACH vs. TWOGOOD ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A debt exists from the time it is contracted or is due, and not *only* from the date of judgment rendered thereon. a

So where the plaintiff's demand *existed* anterior to notice of the transfer of defendant's debt against him, it will compensate and extinguish it as against the original creditor, notwithstanding he transferred it to a third person, before the plaintiff obtained judgment on his demand.

This is a suit to procure the erasure of a mortgage which resulted from a building contract of \$7000, entered into by the plaintiff with the defendant, Twogood.

The plaintiff shows that by the terms of the contract, the building was to have been finished and delivered the 1st of April, 1838, but was not finished according to contract. He further shows that by payments and deductions he had reduced the principal sum to \$1778. This was admitted.

It further appeared that the plaintiff having a demand against the defendant, Twogood, brought suit in October, 1837, and in March following the matter was submitted to amicable compounders, who awarded the plaintiff \$2100, which was confirmed by a judgment of the court on the 18th of April, 1838. In the meantime the defendant assigned the balance due on the building contract of \$1778 to A. D. Crossman, on the 8th of March, 1838, which was notified to the plaintiff on the 16th of April. The sole question is had the plaintiff's demand of \$2100, effect against Twogood before the transfer of

his debt of \$1778, so as to compensate and extinguish it? If so does it entitle him to have the mortgage resulting from the building contract erased and cancelled?

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Roselius, for the plaintiff.

Mazureau, for defendant.

L. C. Duncan, for defendant, Crossman.

Morphy, J. delivered the opinion of the court.

The object of this suit is to obtain the erasure from the registry of mortgages of a recorded lien resulting from a building contract entered into between plaintiff and Twogood. The petition sets forth that Twogood undertook to build a house for plaintiff for the sum of \$7000 to be delivered on the 1st of April, 1838; that the house was not delivered at the stipulated period, and that the materials and workmanship were so defective that when the objections to the same were submitted to arbitrators chosen by mutual consent, a deduction of \$827 was made from the price originally agreed upon; that plaintiff has paid to Twogood at different times \$4243 32, on account of said building; that Twogood about that time became indebted unto plaintiff in the sum of \$2100 for a judgment obtained against him, and owes moreover to plaintiff \$227 for house rent, for not delivering the building at the stipulated time; that the sums thus paid by plaintiff or due to him by Twogood exceed \$7000; that after all his claims under the building contract were thus extinguished by payment or compensation, Twogood, with a view to take an illegal advantage over plaintiff, made a simulated assignment of his contract to his co-defendant, Crossman, who combined and connived with him for the purpose of injuring the plaintiff; that although the defendants well knew that nothing remains due by plaintiff under the contract, they illegally and tortiously refuse to cancel and annul the lien resulting from it to the great injury and damage of plaintiff; the petition concludes with a prayer for damages

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and for the erasure of the inscription taken by Twogood on the house. Crossman alone answered, averring that for a just and legal consideration Twogood did assign to him the contract made with plaintiff; that allowing all just and reasonable deductions there remained yet due on said contract \$3000, which he claimed in reconvention. There was a judgment below in favor of plaintiff, and Crossman appealed.

There is an admission on the record that if Crossman is entitled to recover, the amount cannot exceed \$1778. The sole question then for our decision is, whether this balance due on the building contract was not extinguished and compensated by the judgment of \$2100 obtained against Twogood. The assignment of the latter to Crossman was executed on the 8th of March, 1838, and notified to the plaintiff on the 16th of April following. It is clear that until such notification took place, Twogood continued to be the creditor of Plaintiff for \$1778; and that this claim was subject to be extinguished by compensation, in case the plaintiff became Twogood's creditor to an equal amount; *Pothier, traité des obligations, Vol. 2, No. 596.*

The evidence shows that the suit in which the plaintiff obtained his judgment against Twogood, commenced in October, 1837; that on the 17th of March, 1838, amicable compounders appointed by the parties rendered an award in favor of plaintiff for \$2100; and that this award was homologated and made the judgment of the court on the 18th of April following. It is contended by the appellant that no compensation could take place because the judgment against Twogood was rendered only two days after notice of the assignment was given to plaintiff. This argument assumes that the indebtedness of Twogood to plaintiff arose out of the judgment itself, and did not exist before its rendition. A judgment does not create the indebtedness of a party; it only declares it to exist, fixes its amount and secures to the suitor the means of enforcing payment. But in this case, moreover, the judgment rendered on the 18th of April was only a decree confirming the award in

A debt exists from the time it is due, and not only from the date of judgment rendered thereon.

So where the plaintiff's demand existed anterior to notice of the transfer of defendant's debt against him, it will compensate and extinguish it as against the original creditor; notwithstanding he transferred it to a third person before the plaintiff obtained judgment on his demand.

favor of plaintiff, made on the 17th of March preceding. It was this decision which liquidated the rights of plaintiff and fixed the extent of Twogood's indebtedness to him; it was final between the parties and could not be modified by the court; La. Code, arts. 3096, 3077. The plaintiff then became the creditor of Twogood for \$2100, before receiving notice of the assignment to Crossman; and the claim of \$1778 yet due under the contract was extinguished by compensation; La. Code, art. 2200.

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The judgment of the District Court is therefore affirmed with costs.

NICOLET'S EXECUTOR vs. GLOYD ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Where the defendants, sued as drawers of a draft, plead the want of due notice, but admit it was for accommodation, and one of them offered to give endorsed notes in payment: *Held*, that the *onus probandi* of their having funds in the hands of the drawees, devolved on them.

This is an action against Gloyd & M'Donnell as the drawers of a bill of exchange in New York on J. & W. Gallaher, of New Orleans, for \$3969, which was duly accepted, payable nine months after date, and protested for non-payment.

The defendants admit the drawing of the bill but rely on a want of due notice of protest. They plead a general denial.

It was proved the bill was an accommodation acceptance as admitted by one of the drawers; who also offered notes in payment at long dates.

It appeared in evidence that the notary addressed notices of

EASTERN DIS. protest to the drawers in New York, where the bill was made,
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The judge *a quo*, however, considered them bound; that if they had not due notice it was incumbent on them to show they had placed funds in the hands of the drawees. From judgment against them the defendants appealed.

Lockett & Micou, for plaintiff.

F. B. Conrad, contra.

Martin, J. delivered the opinion of the court.

This is an action against the drawers of a bill of exchange protested for non-payment. The defendants pleaded the general issue; there was judgment against them in solido, and they appealed. M'Donnell, one of the defendants, having failed and made a cession of his property since the rendition of the judgment in the court below, the syndic has appeared and made himself a party in this court.

The plea does not deny the signature of the defendants. Those of the endorsers and the protest, were duly proved; but regular notice does not appear to have been given to the defendants. It is however shown the defendants admitted that the draft was an accommodation one, and that one of the defendants, with the knowledge of the irregularity of notice, offered to give endorsed notes at long dates, which were refused.

Where the defendants, sued as drawers of a draft, plead the want of due notice, but admit it was for an accommodation, and one of them offered to give endorsed notes in payment—
Held, that the *onus probandi* of their having funds in the hands of the drawees devolved on them.

The judge *a quo* has, in our opinion, correctly concluded that the foregoing testimony threw upon the defendants the *onus probandi* of their having had funds in the hands of the drawees, and that they suffered in any delay for want of notice of protest.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs; and it is further ordered that the portion of the insolvent, John M'Donnell, be paid by the syndic, R. Brenan, who is made a

party in this court, out of the estate, in due course of administration. EASTERN Dis.
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HERMANN, BRIGGS & CO. vs. HOOTSELL ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

Under the laws of Mississippi the maker of a note has the right to oppose against all subsequent endorsees, the same equities and defences which he may have against the original payee.

Where the bill of sale of certain slaves expresses it was for *cash*, and the purchaser gave a note for the balance of account due the vendor, including the *price* of the slaves: *Held*, that the note and bill of sale are of equal dignity, and no other evidence being produced that the note was given through error, the legal presumption is, it is justly due, and that no cash was actually paid as stated in the bill of sale.

This is an action on a promissory note, executed jointly and severally by Mrs. A. M. Glasscock and John Hootsell, at Natchez, on the 27th of March, 1838, payable eight months after date, to the order of Samuel Cotton, for \$1944 89.

The suit was commenced by attaching property of Hootsell in the hands of Franklin & Henderson in New Orleans.

Hootsell admitted his signature, but averred the note was given in error; that he signed as surety of Mrs. Amanda M. Glasscock, who had executed it at the instance of Samuel Cotton, from whom she had purchased a negro woman and child for \$1300; that Cotton gave a bill of sale expressing it to have been made for cash, and afterwards made out an account against her, including the \$1300, said to have been paid in cash, and with other items and some credits allowed, left a balance of \$1944 89, for which the note was given.

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Mrs. Glasscock now intervened and set up the error complained of, and prayed that the note be cancelled as having been executed in error.

The facts on which the case mainly turned are fully set out in the opinion of the court.

The Parish Judge was of opinion that the bill of sale was evidence of the price of the slaves having been paid in cash; and that this amount being included in the account for which the note was afterwards given was error, and could not be recovered. There was judgment for the balance of \$644 89, with 8 per cent. interest, after deducting \$1300, the price of the slaves. The plaintiffs appealed.

Grima & Farrar, for the plaintiffs.

Maybin, for the defendant.

R. N. & A. N. Ogden, for the intervenor.

Simon, J. delivered the opinion of the court.

Plaintiffs seek to recover \$1944 89, which is the amount of a promissory note of hand subscribed *in solido* by the defendant and by the intervenor, Mrs. A. M. Glasscock, to the order of Samuel Cotton, who endorsed it over to the plaintiffs.

The defence sets up that said note was given through error under the following circumstances: that on the 21st of December, 1836, Cotton sold to A. M. Glasscock, the intervenor, a negro woman, Patsey, and child, for the sum of \$1300, which was paid *in cash* by her or by her agent; that having had other dealings previously and subsequently to the sale, a settlement took place between them at Natchez on the 27th of March, 1838; that the account, made by Cotton shows a balance of \$1944 89, purporting to be due him by Mrs. Glasscock, which account she settled by giving Cotton the note sued on. That in said account, said Cotton through error or design again charged for the sum of \$1300, being the price of said slaves, which error she did not discover and was

entirely ignorant of. The defendant further avers that he signed the note as security, that he knew nothing of the error or design of Cotton, who afterwards passed away the said note; but that according to the laws of Mississippi, where the transaction took place and where the parties resided, the note, though in the hands of plaintiffs, is subject to all the equity and to all the objections which existed between the original parties.

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A few days after the defendant's answer was filed, A. M. Glasscock intervened to oppose plaintiff's claim on the same grounds alleged by the defendant. The Parish Court deducted the sum of \$1300 from the amount of the note, and gave judgment in favor of the plaintiffs for \$644 89 only; from which judgment said plaintiffs appealed.

There is no doubt that under the laws of Mississippi, the maker of a note has the right to oppose against all subsequent endorsees, the same equities and defences which he may have against the original payee. The first and principal inquiry therefore will be whether the defendant and the intervenor have adduced sufficient proof of the facts by them alleged against the plaintiffs' right of recovery?

Under the laws of Mississippi, the maker of a note has the right to oppose against all subsequent endorsees, the same equities and defences which he may have against the original payee.

In support of their defence, they have produced the bill of sale from Cotton to the intervenor, in which it is stated that "for and in consideration of the sum of thirteen hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged, he has this day bargained, &c." The next evidence is the detailed account signed by Cotton, which was the foundation of the note sued on; said account is composed of several small sums, which, with the item of \$1300, stated thus: "1 negro woman and child got last January 6, as cash, \$1300," make the aggregate amount of \$2090 26, to which adding two small balances of account for the years 1835 and 1836, and upwards of \$300 interest, and deducting therefrom a credit of \$400 paid on the day of settlement (27th March, 1838) make the very same amount for which the note sued on was given. The defendant has also introduced the testimony

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of a witness to show Cotton's hand writing to the two documents, and particularly to prove that the slaves mentioned in the account are the same named in the bill of sale.

From an inspection of the account, which, as we have already noticed, is composed of small items, except the sum in dispute; and from the circumstance that four hundred dollars in cash were paid on account thereof by the intervenor on the day of settlement, it is difficult to believe that she would have given her note for the balance of said account, including therein \$1300 which she had already paid, if she had not been satisfied that she owed it. No attempt has been made to introduce any evidence that the intervenor really made the payment of the thirteen hundred dollars mentioned in the bill of sale; and this was, in our opinion, necessary to destroy the presumption arising from the fact of her having given the note sued on, which must be considered at least as *prima facie* evidence of

Where the bill of sale of certain slaves expresses it was for cash, and the purchaser gave a note for the balance of account, due the vendor, including the price of the slaves: *Held*, that the note and bill of sale are of equal dignity, and no other evidence being produced that the note was given through error, the legal presumption is, it is justly due, and that no cash was actually paid as stated in the bill of sale.

its being justly due, until the contrary is shown. The strength of the defence however is that the bill of sale itself shows the thirteen hundred dollars to have been once paid, that this cannot be contradicted by parol testimony, and that consequently the same sum must have been charged in the account through error or design. This, it seems to us, is a *non sequitur*; if on the one hand, the bill of sale shows that the \$1300 were paid; on the other hand, the settlement of account and the note given for the balance due thereon, prove that said balance is due; the evidence is of equal dignity, and therefore we cannot take the acknowledgment made in the bill of sale, as conclusive proof of the error alleged, when we have a counter acknowledgment in writing that the sum claimed is justly due. It is of every day's occurrence that, in the ordinary transactions of men, deeds of sale of real property and slaves are passed for cash, although the vendor does not receive a cent, and that the object of the parties to such sales being to give a title to the purchaser clear of mortgages, the vendor takes a note for the amount of the sale. In such cases, the note is considered as having the effect of a counter-letter, which cannot be destroy-

ed by the recital in the deed that the amount of the purchase money was actually paid in cash; the note is due independent of the sale though growing out of the same transaction, and the only consequence against the vendor is that he has no longer the power of exercising his mortgage and legal privilege. In the absence of any other evidence, we may fairly presume that the note sued on was given under similar circumstances, and giving to it the force of a counter-letter, we shall naturally suppose that the parties, by settling their general account, and the intervenor by giving her note, intended to provide against the consequences of the acknowledgment contained in the bill of sale, and to secure to her vendor the payment of the price of the slaves. We think that the defendant and intervenor have not satisfactorily proven their allegations and that the judge *a quo* erred in giving them credit for the sum in dispute.

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This view of the case renders it unnecessary to examine the question arising from the bill of exceptions taken to the opinion of the lower court, rejecting the parol evidence offered by plaintiffs to show that according to the common law and statutes of Mississippi, it was competent for them to inquire into the facts of non-payment of money acknowledged to have been received in a written instrument; and to prove that in fact no money had been paid by the intervenor to Cotton as stated in the bill of sale. But the evidence itself accompanies the record, and we find in it the proof of an important fact which appears to us to be unexceptionable, to wit: "that the bill of sale of the slaves from Cotton to A. M. Glasscock, *remained in the hands of Cotton* till after the settlement of accounts above spoken of, and that it remained in the desk of said Cotton in his store till after said settlement, when it was delivered to the said A. M. Glasscock." This part of the evidence objected and excepted to, does not, it seems to us, prove any thing contrary to or beyond what is contained in the written instrument, but goes merely to establish a circumstance relative to the acts done by the parties independent of the written sale, and there-

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fore cannot be rejected; 13 *La. Rep.*, 268. This testimony explains the whole transaction, and puts it before us in its true light; it is clear that the intervenor, although the slaves had been delivered to her, never was put in possession of the bill of sale containing the receipt of the \$1300 in dispute, until she gave her note to Cotton as the balance due by her in consequence of the settlement of their accounts; and it is thereby obvious that she had not paid the amount of the purchase money at the date of the instrument, and that it was only after getting her note, that Cotton gave her a written title to the slaves by her purchased. This accounts for the reason why the same amount was carried in the account current *as cash*. Cotton, by giving up the bill of sale receipted, considered it *as cash* at the moment of closing his transactions with the intervenor, or in other words, as an advance by him made to her, in cash, for which at the same moment, she gave him her note with satisfactory security.

We are satisfied that the defendant owes the whole amount of the note sued on, and that the intervenor has failed to establish the error by her alleged.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be annulled, avoided and reversed; and proceeding to give such judgment as, in our opinion, ought to have been rendered by the inferior court; it is ordered, adjudged and decreed that the intervenor's claim be rejected and that the plaintiffs recover of the defendant the sum of nineteen hundred and forty-four dollars and eighty-nine cents, with eight per cent. interest per annum thereon from the 30th of November, 1838, until paid, with costs in both courts to be paid by the said defendant and the intervenor.

ROUZAN vs. ROUZAN'S CURATOR.

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**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW ORLEANS.**

**ROUZAN
vs.
ROUZAN'S CURA-
TOR.**

The testimony of two witnesses to the declarations of the deceased father that he owed his daughter (the plaintiff) \$500, was received as evidence of the existing debt, although there was an attempt to discredit the testimony.

The plaintiff, Alexandrine Rouzan, alleges she loaned her father \$500 in his life time, which she is entitled to receive from his estate. She prays that her claim be allowed.

The curator pleaded a general denial; and the attorney for the absent heirs required strict proof of the demand.

Two witnesses were called by the plaintiff. One of these, J. Aguilard, swore positively to the acknowledgment of the debt by the deceased; and the other declared the deceased intimated to him in conversation that he owed the money to his daughter.

Attempts were made to discredit Aguilard, by calling witnesses who declared they would not believe him.

The Judge of Probates, however, considered the testimony sufficient to establish the demand, gave judgment for the plaintiff and the curator appealed.

Canon, for the plaintiff.

Preaux, contra.

Simon, J. delivered the opinion of the court.

Plaintiff seeks to recover the sum of \$500, which she alleges to have lent to her father in the month of June, 1835. The answer is a general denial. She had judgment in the court below, and the defendant appealed.

The only question presented in this case is one of fact. Several witnesses have been examined to prove the plaintiff's claim; the testimony of one of them named Joseph Aguilard, establishes positively that the deceased repeatedly acknowledged that he owed the plaintiff the sum of five hundred dollars; and

EASTERN Dis. this evidence is corroborated by the deposition of another witness who proves a conversation which he had with the deceased
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WILCOX ET AL. ed, in which he intimated his indebtedness to the plaintiff. An
vs. attempt has been made to impeach the testimony of Aguilard,
HUIE. and to discredit him, by showing that he ought not to be believed upon oath; but on the part of the plaintiff, several individuals have sworn that they would believe him; and after hearing all the witnesses, the judge *a quo* was of opinion that the plaintiff was entitled to judgment.

It does not appear to us that any error has been committed; the inferior judge saw the witnesses testify, had a full opportunity of judging of the degree of credibility which could be placed in their testimony, and we are not ready to say that he came to an erroneous conclusion on the facts disclosed by the evidence.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

WILCOX ET AL. vs. HUIE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

It is irregular and illegal to set aside a judgment by default to permit dilatory exceptions to be filed; but the order setting aside such judgment cannot be treated as a nullity in order to render final judgment. It might be waived and the exceptions considered; but the regular way was to rescind the order as improperly made.

This is a suit against Huie & Hale as endorsers of a note. Judgment by default having been rendered against Huie on failing to answer, the next day his counsel filed dilatory exceptions and had the judgment by default set aside. Three days

afterwards, the plaintiff on proving his demand had final judgment against Huie without deciding on the exceptions; the court disregarding them and treating the order setting aside the judgment by default, as a nullity. From this judgment, Huie appealed, who is alone before the court.

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WILCOX ET AL.
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HUIE.

Josephs, for the plaintiffs.

Peyton & Smith, contra.

Martin, J. delivered the opinion of the court.

The defendants being sued as endorsers of a promissory note, failed to answer, and judgment by default was taken, which on motion of Huie's counsel was set aside as to him, on filing dilatory exceptions. The judgment was however made final against him; the judge disregarding the exceptions, and being of opinion that the order setting aside the judgment by default was a nullity, inasmuch as it was not granted for the purpose of putting in an answer to the merits according to law, but simply a dilatory exception, which is prohibited by the 23d section of the act of 1839, amending the Code of Practice.

It appears to us the court erred. The order setting aside the judgment by default was erroneous, but not a nullity. The plaintiff had a right to have it rescinded, but this he might waive, and the cause be proceeded in to judgment on the exceptions, notwithstanding the order remained undisturbed. This would have required him on the exceptions being overruled, to take a new judgment by default, unless an answer was filed. Such a proceeding would have been more circuitous, but certainly unexceptionable. The shortest and most regular way, would have been to rescind the order, allowing the exceptions to be filed, as having been improperly made. The plaintiff has, however, chosen to pursue a still shorter mode of proceeding, which appears to us illegal.

It is irregular and illegal to set aside a judgment by default to permit dilatory exceptions to be filed; but the order setting aside such judgment cannot be treated as a nullity in order to render final judgment. It might be waived and the exceptions considered; but the regular way was to rescind the order as improperly made.

The defendant, Hale, made a separate defence and there was a verdict and judgment against him; and both defendants have united in the same appeal. But by an agreement on file sign-

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ed by Hale, "he withdraws his pleas herein, and as far as his interest is concerned, admits the correctness of the judgment."

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed as to the defendant, Hale, by consent: And it is further ordered and decreed that said judgment be annulled and reversed so far as it relates to the defendant Huie; and the case remanded for further proceedings according to law; the plaintiffs and appellees paying the costs of the appeal.

MAYOR ET AL vs. HENNEN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The payment by the clerk of a court, in which money is deposited, to the attorney of the party entitled to receive it, is a good payment, and will discharge the clerk from all liability.

This is an action to recover from the defendant the sum of \$68,637, which the plaintiffs allege he failed to pay over to them, out of a larger amount which had been deposited in the U. S. District Court, of which he was clerk.

The defendant justified and explained the manner he had paid over the large amount of monies and notes deposited in the U. S. District Court to the plaintiffs by order of said court; averring that he had made the payment to the plaintiffs or their lawful agent. He then sets up a balance due him on this transaction for commissions amounting to \$1386 29, for which he prays judgment in reconvention.

The principal facts involved, are that the city recovered a large sum, which was in contest with the United States, and deposited in court to await the event of the suit.

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When the final decision came, the attorney for the plaintiffs procured an order of court, on presenting the mandate for the delivery of the money and notes in contest to the successful party. The defendant, as clerk of the court, gave to the attorney who had the management of the case, checks and orders on the banks where the money and notes were deposited; and among them two checks amounting to \$64,692, being the principal part of the sum now claimed. The attorney gave a receipt therefor as attorney and agent of the corporation of New Orleans; which sum the evidence showed he appropriated to himself for the amount of his fee in the case.

On the evidence produced, there was a verdict and judgment for the defendant, allowing him his reconventional demand; from which the plaintiffs appealed.

Canon, for the plaintiffs and appellants, contended that the attorney had no authority to receive this money; that it should have been paid over to the treasurer of the city of New Orleans. The agency or employment of the attorney was special and did not authorize him to settle the claim and receive the money. The defendant therefore paid in his own wrong.

Eustis & Grymes, for the defendant.

Martin, J. delivered the opinion of the court.

A judgment obtained by the United States against the Mayor, Aldermen and inhabitants of the city of New Orleans, in the District Court of the United States for the Eastern District of Louisiana, having been reversed by the Supreme Court of the United States, the corporation of New Orleans became entitled to a very large sum of money, which had been deposited in two of the banks of the city to await the event of said suit. A member of the bar who had been employed by the corporation to provoke the reversal of the judgment, on filing

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the mandate of the Supreme Court procured an order from the District Court for the payment of the money thus deposited to the credit of the plaintiffs in error; and obtained from the present defendant, then clerk of the said District Court, two checks amounting together to the sum of \$64,692 15, which he claimed from the corporation as a compensation for his professional services in the case. The present suit is brought to recover this sum from the defendant, as having been improperly paid; and the plaintiffs are appellants from a judgment which disallows their entire claim, and gives to the defendant the sum of \$1386, on his reconventional demand set up in his answer.

The counsel for the appellants, besides questioning the right of the attorney to receive any money of theirs, have laid great stress on an allegation that he was entitled to no compensation from them, and if entitled to any, to a very small sum in comparison to that he received.

It has appeared to us perfectly useless in the decision of this case, to inquire into the claim of the attorney against the corporation; for his right to receive the money resulted from his having been employed to provoke the judgment under which the corporation became entitled to the money. If this circumstance authorized him to receive the whole amount of the judgment it is immaterial to inquire whether the part which was paid to him be more than was justly due to him for his fee. The Louisiana Code, article 2139, provides that "payment to an attorney at law, employed to sue for the payment will discharge the debtor, although the attorney be not specially empowered to receive the debt." It is therefore clear that the attorney derived his authority to receive, from his employment to procure the judgment and needed no special authorization. The defendant and appellee consequently paid in compliance with an order of court, requiring him to pay the money which had been deposited in the banks, to the corporation or its agent; and there is not the least suggestion that he did not act in good faith.

The payment by the clerk of a court, in which money is deposited, to the attorney of the party entitled to receive it, is a good payment and will discharge the clerk from all liability.

Neither party has drawn our attention to the plea in recon-
vention, or complained of the judgment rendered thereon.

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We have not thought it our duty to look into it.

CLARKE ET UX.

It is therefore ordered, adjudged and decreed that the judg-
ment of the District Court be affirmed with costs.

vs.
FIREMEN'S INS.
CO.



CLARKE ET UX. vs. FIREMEN'S INSURANCE COMPANY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The husband has the power of administering the estate of his wife, whether it be
dotal or paraphernal, particularly her moveable property.

As the administrator of his wife's property, the husband has such an interest
and right therein as authorizes him to insure it even in his own name, without
declaring the nature and extent of his interest.

Where the policy has reference to furniture generally, in a house which is de-
scribed, without mentioning that part of it was stored in the garret, it is suffi-
cient to authorize a recovery for the loss.

This is an action on a policy of insurance. The plaintiff and
wife allege that insurance was effected on a large quantity of
furniture, in a house in the city of Lafayette, built, the lower
story of brick and the second of wood; said furniture belong-
ing to them, amounting to \$1000.

The defendants averred that by the policy, insurance only
was effected on the property of J. Calvit Clarke, the husband,
and that the furniture alleged to be destroyed was the property
of the wife and not covered by the policy; that it was only in-
tended to insure such furniture as was in use in the house,
such as beds, tables, &c., which would easily be removed in
case of fire; but that most of the furniture for which indemnity
is claimed was stored in a garret and is not embraced by the de-
scription in the policy of insurance.

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CO.

Upon these pleadings and issues the cause was principally tried.

It was shown by the evidence that Mrs. Clarke had been the keeper of a boarding house in Julia street, but had removed to a small house in Lafayette; and that a portion of the furniture not immediately or constantly used was stored in the garret. The policy was taken out in her husband's name and the house and furniture fully described. The fire and loss of property was proved within the time of the policy.

The District Judge was of opinion \$750 would replace the loss and damage, gave judgment for that sum, from which the defendants appealed.

Roselius & Clarke, in propria persona, for the plaintiffs and appellees.

Lockett & Micou, for the defendants.

Simon, J. delivered the opinion of the court.

Plaintiffs sue for the recovery of the sum of thousand dollars, which is the amount of a policy of insurance. They allege that in consequence of the loss and destruction by fire of a certain quantity of household furniture contained in their dwelling house; which furniture was covered by the said policy, to the aforesaid amount of \$1000, they are entitled to claim indemnity from the underwriters to the full amount of the policy. Defendants plead that the insurance declared on was effected only on the property of J. C. Clarke, and that the loss occurred was on the separate property of his wife, which was not insured. That the loss occurred on property not embraced in the description of the policy; that an officer was sent to the house containing the property offered for insurance, for the purpose of examining into the situation and value of the said property, and that none of the property for the loss of which indemnity is claimed was shown to the officer. They further aver that the property in question was not required for

the ordinary purposes of plaintiffs' family, and was not used by them as household furniture; that the same was stored in a garret of the house; that if the same had been shown to their inspector for insurance, a larger premium would have been required; and that when the fire took place, if the furniture had been shown to be in that part of the house, or if notice had been given to the firemen, there was ample time for the removal of the same, and the same would have been removed and saved.

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The lower court gave judgment in favor of the plaintiffs for seven hundred and fifty dollars; from which judgment the defendants appealed.

The offer or application for insurance signed by J. C. Clarke, says that "insurance is wanted for one year on household furniture, looking glasses, beds, &c., to the amount of one thousand dollars, contained in a house in Lafayette city, on Bellegarde street, built, the first story of bricks, the second *and garret* of wood and covered with slate." There is an accidental variance between the offer and the policy with regard to the description of the house; several witnesses have been heard to establish all the circumstances relative to the fire, the extent and value of the loss and damage, and the situation of the furniture in the different rooms of the house, and particularly in the garret where a certain quantity of it was stored. The evidence shows also that this furniture was occasionally used, as it was wanted; that the house was small and the family very large, in consequence of which, said furniture was taken up stairs, and only brought down when it was to be used, and it is also established that the property which was lost, destroyed or damaged, belonged to Mrs. Clarke, who formerly kept a boarding house.

The husband has the power of administering the estate of his wife, whether it be dotal or paraphernal, particularly her moveable property.

The main ground of defence set up by the underwriters is that the furniture did not belong to Clarke, but was the property of his wife, and that therefore he had not himself any insurable interest in the policy. It is perfectly clear that the husband has the power of administering the estate of his wife, and par-

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As the administrator of his wife's property, the husband has such an interest and right therein as authorizes him to insure it even in his own name without declaring the nature and extent of his interest.

Where the policy has reference to furniture generally, in a house which is described, without mentioning that part of it was stored in the garret, it is sufficient to authorize a recovery for the loss.

particularly her moveable property, and to act in his own individual name with regard to the said administration. If the wife's property be dotal, the husband alone has the administration of it, although the wife remains the proprietor thereof; *La. Code, art. 2390*; and if on the contrary, her estate is paraphernal, it is considered to be under the management of the husband, unless it be administered by the wife alone and separately; *Idem, art. 2362*; which is not shown to be the case in the present instance. Clarke had therefore such interest and right in the furniture, as necessarily authorized him to insure it, even in his own name, without its being necessary for him to declare the nature and extent of his interest.

The next ground is that no information as to the exact situation of the property had been given by the plaintiff, and that the risk was increased by the furniture being stored in a garret from which it was difficult to remove it. This objection, is, in our opinion, untenable. The policy of insurance was made in reference to the furniture, &c., generally contained in the house in which the plaintiffs resided, without any distinction or exception as to the particular rooms in which said furniture should be kept. The description of the house given in the written application, shows that the underwriters were informed that there was a garret; and although this was not included in that part of the policy in which the house is described, we think it was the duty of the defendants or of their inspector to look into all the matters or circumstances necessary to ascertain the nature of the risk. The garret was a part of the house, to be used by the inmates, as well as any other apartment; there, they were in the habit of storing the furniture which they did not want for their daily use, and we are unable to see any reason why such furniture should be excepted from the general effect of the policy. If the underwriters were ignorant of this fact, they must attribute it to their own fault or negligence.

On the whole, we think the judge *a quo* did not err in giving judgment in favor of the plaintiffs, and in allowing them

seven hundred and fifty dollars for the loss and damage by them sustained. EASTERN DIS.
May, 1841.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs. OAKLEY & CO.
vs.
HENNEN.

OAKLEY & CO. vs. HENNEN.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

Where the testimony is insufficient to show clearly that the note, endorsed by defendant, was altered after its execution, by adding the words " payable at the Union Bank," he cannot exonerate himself from his endorsement.

This is an action against the endorser of a promissory note.

The defence was, that after it was endorsed, the maker, without the consent and knowledge of the endorser, altered the tenor of said note by adding the following words, " payable at the Union Bank."

The evidence failed to prove the fact of the alteration, relied on in the defence; and there was judgment both in the City Court, and in the Parish Court, to which the case had been taken on appeal, for the plaintiffs, from which the defendant appealed.

L. C. Duncan, for plaintiffs.

Defendant in propria persona.

Simon, J. delivered the opinion of the court.

The defendant is sued as endorser of a promissory note of hand, drawn by one F. W. Lea; his principal defence is that he did not endorse a note of the form stated in the plaintiffs'

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petition. There was judgment against him in the City Court, and an appeal having been by him taken to the Parish Court, a second judgment was rendered against him, from which he took the present appeal.

It is urged that the words "*payable at the Union Bank of Louisiana,*" written as the last part of the body of the note, were so written after said note had been executed and endorsed, and that said note was not originally made payable at any particular domicil. In support of this position, a witness was examined, who, without being presented with the note in question to prove its identity, testifies that said note was given to one John Kern for furniture bought by Lea & Kimball; that it was agreed between Lea & Kimball that no note given by either party should be made payable at any particular place as a bank; that at the time witness saw the note, it was endorsed by defendant; that he did not discover that it was made payable at any particular place; that after the note was traded to Kern, he, said Kern, informed witness that he had got Lea to fix it and make it payable in New Orleans; and that witness does not know that said note was made payable in New Orleans.

From an inspection of the note sued on, which is clearly shown to be in one and the same hand writing, we are unable to discover that any addition or alteration was ever made to it after its execution; the signature of the drawer appears to have been made after the whole body of the note was written; and the vague testimony of the only witness who was examined, is not, in our opinion, sufficient to justify the belief that said note was not originally made payable at the elected domicil at which the demand of payment was made. This testimony might perhaps serve to raise a suspicion, but this is certainly insufficient to entitle the defendant to the discharge of his obligation as endorser of a note of the dishonor of which he is shown to have had due and legal notice; and as the case stands, we must come to the conclusion that he has failed to make out his defence.

Where the testimony is insufficient to show clearly that the note, endorsed by defendant, was altered after its execution, by adding the words "payable at the Union Bank," he cannot exonerate himself from his endorsement.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.

EASTERN DISTRICT
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ALLEN
vs.
ARNOUIL,

ALLEN vs. ARNOUIL.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

Damages for a frivolous appeal cannot be allowed when the dismissal of the appeal is insisted on by the appellee.

The appeal will be dismissed when the record is incomplete, and contains nothing for the court to act on.

This is a suit against the maker of three promissory notes amounting to \$500, protested for non-payment. There was judgment by default made final.

The defendant came forward and averred he had made a cession of his property and was not liable to be sued; and prayed an appeal.

The record comes up without any evidence except the notes and protests. The other testimony was not taken down. There is no bill of exception, assignment of errors, or statement of facts.

Redmond, for the plaintiff, insisted the appeal was frivolous and taken solely for delay and prayed that it be dismissed; and that the defendant be condemned to pay ten per cent. damages on the amount of the judgment.

Eyma, for the defendant and appellant.

Martin, J. delivered the opinion of the court.

In this case the dismissal of the appeal is asked on the ground that the record comes up in such a shape as precludes an examination of the case on its merits.

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CALDWELL &
HICKEY
vs.
NOLTE ET AL.

Damages are prayed on the ground that the appeal is frivolous and taken for delay, but we are of opinion that they cannot be allowed when the dismissal of the appeal is insisted on by the appellee.

We have examined the record and find it incomplete. The certificate of the clerk shows that it does not contain all the evidence and there is no bill of exception, statement of facts, or assignment of errors.

The appeal is therefore dismissed with costs.



CALDWELL & HICKEY vs. NOLTE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Parties must enforce their rights in courts of justice, according to the forms prescribed by law, or they will fail; however clear are their rights.

So an order on garnishees to pay money into court, obtained *ex parte* and without previous notice, cannot be enforced.

The plaintiffs allege the defendant, Nolte, is indebted to them in a large sum, and has property or effects in the hands of Kirkman, Abernethy & Hanna, and that his residence is out of the State and unknown to them. They pray for an attachment and citation of the garnishees. The latter admitted a balance in their hands due to Nolte of \$3883, attached by Lambeth & Thompson.

The Citizens Bank, under certain arrangements between the plaintiffs, Lambeth & Thompson, and other creditors of Nolte, by counsel moved the court and obtained an order, *ex parte*, on the garnishees, to pay the amount in their hands into court, subject to the disposition of the Bank. The garnishees appealed.

Rosekius & Grima for the Bank and appellees.

Elwyn, for the appellant.

Garland, J. delivered the opinion of the court.

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HICKEY
vs.
NOLTE ET AL.

This suit was commenced by attachment. The garnishees answered under oath, saying they were indebted to Nolte in the sum of \$3883 30; and that they had been cited in a suit commenced by Lambeth & Thompson in another court.

Sometime after this answer, the plaintiffs and a number of other creditors of Nolte, made a proposition to the Citizens Bank, which was accepted, by which the Bank was to advance the amount of the various claims against Nolte, and to take all the property and assets attached, to be sold and administered for the general benefit; various stipulations as to liabilities and partition are made, with which we have nothing to do at present. It was also stipulated that all suits pending should be dismissed at the costs of the plaintiffs, but this clause is modified by a subsequent one, which says "all attachments of other property than cotton, shall continue in full force for the benefit of the creditors attaching the same, in case the bills drawn in their favor shall not be paid in full." Some short time after this agreement, the plaintiffs, Lambeth & Thompson and Nolte signed another agreement, in which it is stipulated that the money owing by the garnishees shall be paid over by them to the Citizens Bank to be credited hereafter to such party as shall appear to be entitled to it. Armed with these documents, the counsel for the bank moved the District Court, without notice to the garnishees, for an order that they pay the amount into court, subject to its future order, which was decreed, and the garnishees appealed.

That the garnishees owe the money is admitted on their oath, that those having claims on it have agreed it should be paid to the bank is unquestionable, and that in good faith and honor the garnishees should have paid it over is in our opinion equally undoubted. We regret that the precipitancy of the

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COIT & CO.
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CHARBONNET ET
AL.

Parties must enforce their rights in courts of justice, according to the forms prescribed by law, or they will fail; however clear are their rights.

So an order on garnishees to pay money into court, obtained *ex parte* and without previous notice, cannot be enforced.

counsel for the Bank, prevents us from now compelling these garnishees to pay the amount with interest and damages. But clear as rights may be, parties must enforce them in the manner prescribed by law. No one has a right to go into a court of justice and have an order or judgment rendered against his debtor without notice, to bring the money owing into court on a fixed day, as has been done in this case. The Citizens Bank had a right to sue these garnishees as being vested with the rights of all the parties, or it might have intervened in the case as directed by articles 389 and 390 of the Code of Practice, and the 10th section of the act of 1826, amending the said Code; Session acts, p. 172. We are bound to reverse the judgment of the District Court, but as we think speedy justice should be dealt out to the appellants, we will in conformity with the powers vested in the court by article 906 of the Code of Practice remand the case to enable the Bank to intervene in the suit, if it chooses or can do so, and obtain the money acknowledged to be due.

The judgment of the District Court is therefore annulled and reversed, and it is further ordered that this case be remanded to the District Court to be proceeded in according to law; the Citizens Bank paying the costs in this court and the court below.

COIT & CO. vs. CHARBONNET ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The defendants, sued as endorsers, failed in proving their defence, and judgment against them was affirmed.

This is an action against the endorsers of a promissory note for \$1610, signed by C. Parlange.

The defendants severed in their answers, but admitted their signatures and pleaded novation; averring the plaintiffs had received goods and a new note for the original debt.

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On the trial evidence was offered to prove the *maker* of the note had sent \$900 worth of drilling and a note for \$1000, endorsed by Materre, in lieu of and to take up the note sued on. The plaintiffs' witnesses proved that this arrangement never took effect; the drilling and note offered, were not accepted or received by the plaintiffs.

There was judgment for the plaintiffs and the defendants appealed.

L. Peirce, for the plaintiffs.

Pepin, contra.

Martin, J. delivered the opinion of the court.

The defendants, sued as endorsers of a promissory note, severed in their answers, admitted their signatures as endorsers, and pleaded novation. There was judgment against them and they appealed.

The case has been submitted to us without an argument. A close examination of the evidence has satisfied us that the Judge of the Commercial Court did not err in concluding that the defendants had failed in establishing their defence.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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HALL
vs.
GAIENNIÉ ET AL.

HALL vs. GAIENNIÉ ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW ORLEANS.

Where a partner accepts a draft in the name of the firm, but which is for his individual benefit, on payment, the other partner may be subrogated to the creditor's rights and recover the amount from his co-partner.

This case comes up from a judgment dissolving an injunction which L. R. Gaiennié had obtained to arrest and enjoin an execution, taken out against him for \$1717 56, and costs, in the name of the plaintiff, who had been paid his debt by C. Deneufbourg, and subrogated the latter to all his rights against Gaiennié.

The evidence shows that while Gaiennié and Deneufbourg were commercial partners, Gaiennié accepted a draft drawn by one C. M. Dougherty on said firm, which was for his individual benefit. The plaintiff being the holder of this draft, sued the firm after its dissolution; obtained judgment and issued execution, which was stayed by plaintiff, and Deneufbourg paid the amount and was subrogated to Hall's right in the said judgment. Gaiennié in the meantime appealed to the Supreme Court but was not joined by his co-partner and co-defendant. See the case in 15 La. Rep., 430.

Deneufbourg sued out a second execution against Gaiennié for the whole amount. The latter enjoined it, alleging he was liable for only one-half.

Deneufbourg replied that the draft accepted by Gaiennié was for his individual benefit and he alone is bound to pay and refund the amount thereof.

There was judgment for the plaintiff, dissolving the injunction with damages and Gaiennié appealed.

Canon, for the plaintiff and appellee.

C. Janin, for L. R. Gaiennié, appellant.

Morphy, J. delivered the opinion of the court.

Gaiennié, one of the defendants appealed from a judgment *in solido* against him and his former partner and co-defendant, Deneufbourg; this appeal has been disposed of at a former term of this court; see 15 La. Rep., 439. During the pendency of this appeal, an execution issued against Deneufbourg, who had not joined in it. He paid the amount of the debt and received from Hall a subrogation to all his rights under the judgment. Being thus subrogated, Deneufbourg took out a *fieri facias* against Gaiennié for the whole sum. The latter enjoined the execution of this writ on the ground that he was liable only for one-half of the amount of the judgment which he avers that he offered to pay provided he obtained a full discharge of the claim. To the petition of Gaiennié suing out this injunction, Deneufbourg, as transferee of Hall's rights and in his own name, answered that Gaiennié was liable for the whole amount of the judgment in question, because the draft on which it had been obtained, though apparently accepted by the firm of Gaiennié & Deneufbourg, was not really due by said firm; it being for a private transaction of said Gaiennié, which does not appear in the books of the partnership, and that it ought to have been paid by said Gaiennié alone. The answer concludes with a prayer for the dissolution of the injunction and for damages. Upon these pleadings the parties went to trial below. Deneufbourg obtained a judgment in his favor, from which the plaintiff in injunction appealed.

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The parties to this controversy having gone into the merits of the same without any objection as to the form and manner of proceeding in the premises, the only question presented is whether L. R. Gaiennié accepted Dougherty's draft for the business of the firm or not, or in other words whether the firm owed the draft or whether it was due by Gaiennié alone.

An attentive examination of the evidence has satisfied us as it did the judge of the court below, that although made in the name of the firm by Gaiennié, the acceptance on Dougherty's draft was for his individual benefit and account; and not for that of the firm. After paying the draft for which the firm

Where a partner accepts a draft in the name of the firm, but which is for his individual benefit, on payment the other partner may be subrogated to the creditor's rights and recover the amount from his co-partner.

EASTERN Dis. was responsible to a *bonâ fide* holder, Deneufbourg, under his
May, 1841. subrogation from Hall, has an undoubted right to recover back
 from Gaiennié the whole amount paid, for which the latter was
 alone and individually bound.

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vs.
JUDGE OF THE
THIRD DISTRICT.

The judgment of the Parish Court is therefore affirmed with costs.

STATE vs. JUDGE OF THE THIRD DISTRICT.

AN APPLICATION FOR A MANDAMUS.

The appellant from a judgment dissolving an injunction obtained against an order of seizure and sale, cannot take a suspensive appeal without giving security as in other cases of such appeals. Security for costs is not sufficient.

The article 740 of the Code of Practice is an exception to the rule, requiring security in obtaining an injunction to stay an order of seizure and sale, but only applies to that class of cases.

This is an application for a mandamus to compel the judge of the Third Judicial District holding court in the Parish of East Feliciana, to grant a suspensive appeal, *without giving security* except for costs, from a judgment dissolving an injunction, which one William Dunn had obtained against an order of seizure sued out by Robert Dyer on an act of sale and mortgage of a plantation and 21 slaves, sold by him to the former.

The injunction was originally obtained under the 740th article of the Code of Practice, permitting injunctions to enjoin executory proceedings *without giving security*. The applicant applied for a suspensive appeal under the provisions of this article, supposing appeals to be equally exempt from security, as it was from a judgment in a summary proceeding.

Lawson, for the applicant, moved the court on filing the petition and affidavit of Dunn praying for the mandamus, for a rule on the judge of the said district to show cause why the mandamus should not issue. The court took the case under consideration.

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Garland, J. delivered the following opinion of the court.

In the year 1839 Dyer by an authentic act sold Dunn a plantation and 21 slaves, situated in the parish of East Feliciana, for the sum of \$21,000, payable in three equal installments. On account of the first payment, between five and six thousand dollars were paid, and the mortgage retained on the land released. In July, 1840, the parties entered into a written agreement to rescind the sale. Dunn was to reconvey the whole estate and account for the hire of the negroes and use of the other property; Dyer was to account for various sums paid to him and others, on his account. The parties met on the 25th of July to conclude the business, but seem to have differed about some things in their settlement, and no conveyance was ever made, or the contract otherwise executed. A few days after, Dyer took out an order of seizure and sale on his mortgage, Dunn enjoined it under the article 739 of the Code of Practice, and says that by article 740 he was not bound to give security, nor was any required of him. Dyer under the article 741 moved to try the case summarily; it was taken up by the court and the injunction dissolved, but in the judgment it is ordered that upon Dunn giving bond and security for \$13,500, the injunction shall be re-instated. From this judgment Dunn asked a suspensive appeal, which the judge granted, upon his giving bond and security for \$13,500. He now applies to this court for a rule upon the judge of the third district to show cause why a mandamus should not issue, directing him to allow a suspensive appeal, upon his giving bond and security for costs.

The appellant from a judgment dissolving an injunction obtained against an order of seizure and sale, cannot take a suspensive appeal without giving security as in other cases of such appeals. Security for costs is not sufficient.

This is the first application of the kind that has been made, and the counsel is unable to cite any law or case that sustains it;

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The article 740 of the Code of Practice is an exception to the rule, requiring security in obtaining an injunction to stay an order of seizure and sale, but only applies to that class of cases.

but he urges, that as his client was not bound to give security to obtain the injunction, he is not bound to give it when he takes an appeal, or in other words, that being authorized to go into one court without giving security, he has a right to have his case examined in all others exempt from that burden. We are not prepared to admit this conclusion. The exemption from giving security, granted by the article 740 of the Code of Practice, is an exception to the general rule and cannot be extended beyond the cases specified. The reason of it is, that as the order of seizure and sale is a summary proceeding, some prompt mode of redress should be allowed, to prevent an improper exercise of such power; the injunction, or opposition, more properly speaking, can therefore be filed without security, and a summary investigation take place. The judge then has an opportunity of hearing both parties and correcting any error he may have committed in granting his order on an ex parte application, but when the parties wish to proceed further, we see no reason why the rules of law applicable to other cases should not apply. When the parties are before the court on the petition for an order of seizure and the opposition to it, the issues are joined between them, and then they are entitled to no privileges over other suitors, other than to have a speedy trial of the case.

Another reason why the writ of mandamus is not proper in a case like the present, is that the other party has a deep interest in the question and he will not be before the court. If the appellant chooses to give the security and bring the appellee before us, it is possible he may be entitled to a rule on him to show cause why the bond should not be reduced or cancelled, but in a proceeding against the judge we do not think it should be allowed. Should he not be disposed to adopt this course, the law does not leave him without redress in the ordinary mode.

The application for the rule is therefore rejected with costs.

DELOACH vs. JONES Et Al.

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A Bank, authorized to discount, as an incident to lending money may take security: so also it may lend money on the faith of a cotton crop; and cause the cotton to be shipped by an agent to be sold, to reimburse the loan, without violating its charter.

Where, in a common law state, a party pledges his cotton crop for a certain sum advanced to him, and the pledgee is authorized and required to sell the cotton for reimbursement: *Held*, that as a pledge, it was *defeasible before delivery*, but *afterwards*, the contract was complete.

Delivery is essential to the validity of a contract of pledge in a common law state; and even a parol agreement followed by delivery is legal and binding on the parties and third persons.

In a case of pledge or bailment of goods or personal property, without limitation of time for redemption, the creditor may call on the creditor to redeem after his debt is due, by having a judicial sale, under a decree of foreclosure or upon giving reasonable notice to the debtor to redeem. But the parties may stipulate as to the *time* and *mode* of sale.

So a contract, partaking of the features both of a pledge and of an assignment in trust to secure the payment of a debt, is valid in a common law state.

So where cotton is pledged to secure the payment of a loan of money, and delivered to the agent of the creditor, making the advance, who ships it to be sold for the purpose of paying this loan, it is not liable to an attaching creditor in the hands of the consignee who is made garnishee.

This suit commenced by attachment. The plaintiff residing in Tennessee, filed his affidavit the 11th April, 1840, and on the 13th his petition, alleging the defendant residing in Arkansas, was indebted to him in the sum of \$2,500, which he had to pay as endorser, the 12th April, 1837. He prayed judgment for this sum and for an attachment against the property of said defendant in the hands of Lee & Co., whom he cited as garnishees, and propounded interrogatories. They admitted they had 208 bales of cotton, made on the plantation of the defendant, but which had been marked E. B. and shipped and consigned to them by E. Britton, cashier of the Real Estate Bank of Arkansas, as its agent, and to be sold for and on its account. This cotton was attached.

The Bank of Arkansas now intervened; claiming the cotton under a written pledge and delivery to its agent.

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There was judgment for the plaintiff against the defendant for the amount of his claim; and in favor of the intervention on the part of the Bank. The plaintiff appealed.

Anderson & Elwyn, for the plaintiff.

Culbertson, for the defendant.

P. W. Farrar & Vason, for the intervening party, insisted that this case presented the following facts:

1. That at the time of the levying the attachment there was an existing and unliquidated debt due from Jones to the Bank.

2. That of the existence of that debt the attaching party had notice as well as of the transfer and *delivery* by Jones of the 208 bales of cotton to the Bank.

3. That by the laws of the State of Arkansas, we have a lien upon this cotton to the amount of Jones's debt to the Bank.

4. That the attaching creditor in this State cannot be preferred to the Bank of Arkansas to whom this cotton was transferred before it reached the city of New-Orleans.

5. That Jones had divested himself (as by the law of Arkansas he had a right to do,) of any property in the 208 bales of cotton subject to this attachment.

6. That the cotton was at the time of the levying of the attachment in the hands of the consignee of the Bank, and that the property, legal right and control of the same was in the Bank.

Simon, J. delivered the opinion of the court.

In this case, an attachment was issued at the suit of a resident of the State of Tennessee, against a citizen of the State of Arkansas. Thomas B. Lee & Co. of the city of New-Orleans were made garnishees, and answered the interrogatories propounded to them by the plaintiff, as follows: 1st. that they did receive 208 bales of cotton marked E. B. per steamer *Campté*. 2d. That they believe the cotton was made in the

State of Arkansas, and was shipped, as the annexed bill of lading shows, by E. Britton. 3d. (after objecting to answer this interrogatory) they state that they believe that said cotton was made on defendant's plantation; that the Real Estate Bank of the State of Arkansas, at Washington in said State, owns said cotton, and that the same belongs to said bank: and 4th. That T. B. Lee & Co. have the proceeds of said cotton in their control, and that it is sufficient to pay the claim of the plaintiff as set forth in his petition.

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On the first of May, 1840, the President and Directors of the Branch of the Real Estate Bank of the State of Arkansas at Washington, intervened and alleged that the attachment in this suit having been sued out against the property of Isaac N. Jones, was levied upon the proceeds of 208 bales of cotton in the hands of T. B. Lee & Co. by making them garnishees. That said cotton was shipped by the intervenors' agent E. Britton, for their use and benefit, and consigned to the house of Lee & Co. by said Britton (they refer to the bill of lading) to secure the payment of a draft drawn by Jones on said Lee & Co. for \$10201, payable at the New-Orleans Canal and Banking Company, due 3d of March, 1840, belonging to the intervenors, and that the proceeds of said cotton belongs to the intervenors, in virtue of the delivery to and possession of said cotton by their said agent for the purpose of applying the same to the payment of the draft; and that according to the laws of Arkansas, where the cotton was delivered, they are entitled to the said proceeds and have a right to apply the same to the payment of said draft by privilege and in preference to plaintiff's claim. They pray accordingly.—Plaintiff answered the petition of intervention, by pleading the general issue, and denying specially the intervenor's alleged privilege or lien on the property attached.—There was judgment below in favor of the plaintiff against the defendant for \$2,500, and in favor of the intervenors for the proceeds of the cotton attached; and the plaintiff, after having vainly attempted to obtain a new trial, took the present appeal.

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The facts of the case, are merely these: plaintiff as the surety of the defendant, paid a debt of his to the amount of \$2,500, balance due on a note of hand payable on the 12th of August, 1837.—In August, 1839, the defendant, whose property was under seizure, made application for assistance to the Real Estate Bank of Arkansas, and obtained *the advance of a certain sum* of money, (\$9,658) to pay the seizing creditor, whereupon the defendant executed the following instrument; “Whereas the Real Estate Bank of the State of Arkansas, at the Branch thereof at Washington, Arkansas, has this day advanced and paid over to me the sum of *nine thousand six hundred and fifty-eight dollars*, and in order to secure the prompt, early and punctual payment thereof to said Bank, I have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said Real Estate Bank all of my crop of cotton raised by me at my plantation in Lost Prairie, Lafayette county, Arkansas; and I hereby agree with said Bank, and bind and obligate myself to pick, gin and bale said cotton crop at the earliest possible day, and mark the same in the name of Edwin Britton, (who is the mutual agent of myself and said Bank in the premises,) and deliver the same to said Britton on the bank of Red River, opposite to my plantation in Lost Prairie, Lafayette county, Arkansas; and the said Britton is to ship the same at my expense and charges to New-Orleans, to the commission house of Thomas B. Lee & Co., of the city of New-Orleans, and by them sold, and the proceeds thereof to be paid over by the said T. B. Lee & Co. to the said Edwin Britton agent as aforesaid, and by him applied to the payment of the said sum of \$9,658 aforesaid, and the residue, if any, to be paid over by said Bank to me. In witness whereof, I have hereunto set my hand and seal, this 28th of August, 1839. (Signed) Isaac N. Jones.” Britton was the cashier of the Bank. On the day after said instrument was executed, as a means of repaying the sum advanced, Jones made his draft in favor of Wilson & Paup on T. B. Lee & Co. for \$10,201, payable at six months, at the New-Orleans

Canal and Banking Company, (the amount of said draft, interest off, being the sum so advanced by the bank of Arkansas) which draft was endorsed by the said Wilson & Paup and by Jones himself. In pursuance of the said agreement, about two or three weeks previous to the shipment, the cotton crop, (208 bales) were placed by Jones on the bank of Red River, marked with the initials E. B. The cashier was about the same time informed by Jones that said cotton was so placed there ready for shipment, and accordingly on the 5th of March 1840, said cashier, *as accredited agent of the bank*, shipped the same for the specific purpose of paying the sum advanced. The bill of lading shows that the 208 bales of cotton were shipped by and in the name of Edwin Britton and consigned to T. B. Lee & Co. These facts are corroborated by the testimony of other witnesses and by the answers of the garnishees to the plaintiff's interrogatories. There is also evidence from which it may be strongly inferred that the plaintiff knew and approved of the arrangement between the defendant and the Bank of Arkansas some time before the cotton was shipped; that he was aware of the application of Jones to the bank, and of the assignment of the crop of cotton for the purpose of reimbursing the amount of the sum advanced; that he said he was pleased the bank had raised the money for Jones; and that one or two days previous to the attachment, plaintiff was apprized by T. B. Lee that he had received the cotton, and was directed by the cashier of the bank to pay the proceeds into the Canal Bank.

The first objection made to the intervenors' right of recovery is that the bank had no power or authority to enter into such contract by the laws of the State of Arkansas. The charter of the Real Estate Bank of Arkansas is not before us, but it has been admitted that it was duly and legally incorporated by the legislature of said State; if so, as a bank, the institution has undoubtedly the power to loan money, and it is conceded, that, as an incident thereto, it had the power to take security. It is contended however that the bank could not

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A bank, authorized to discount, as an incident to lending money may take security: so also it may lend money on the faith of a cotton crop; and cause the cotton to be shipped by an agent to be sold, to reimburse the loan, without violating its charter.

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bind itself to the obligations of conveying cotton to market, and to act in the capacity of carriers: This objection, it seems to us is untenable: the appellant's counsel appears to confound the means with the object. The object of the contract was not to convey the cotton to market, but to have it sold after delivery to apply the proceeds thereof to the satisfaction of the debt which it was intended to secure; the bank was not to derive any profit from the transportation of the cotton, it was to be shipped in the name of their cashier and agent, as their property, and consigned for the purposes mentioned in the contract; and the conveying of the cotton to New-Orleans, was only the means through which the bank was to obtain the full and complete execution of the contract. Under the admission that it was *duly incorporated*, and in the absence of their charter, the intervenors, as a corporation, must be presumed to have all the rights and powers as are daily exercised by all the banking institutions of the country; they may make valid contracts, obligate others and obligate themselves towards others, manage their own affairs, exercise their rights, &c.; and we are not ready to say that purchasing or advancing money upon cotton, or any other kind of property, or taking cotton in payment of or as security for their loans, subject to its being sold to be realized in money, should be considered as a violation of the rights and privileges generally granted to such corporations; nay, it is of public notoriety that certain banking institutions have for years been engaged in this kind of business; and unless it be prohibited by their charters, we can see no reason why they should not be allowed to do so for the furtherance of their interest, and particularly to afford them the means of securing their debts and of getting the reimbursement of their funds.

But, it is urged that the cashier had no authority to contract for the bank: the terms of the contract show clearly that it was made for the sole benefit of the bank, and for the purpose of securing a sum of money loaned by and due to the institution; the proceeds of the cotton are to be paid over to the

bank, and when the cashier acted as the agent of said bank, the only consequence was that, if he had acted *without authority*, the institution might perhaps have been allowed to disavow and repudiate his acts; but here, instead of doing so, the intervention, which is in the name of the President and Directors, shows conclusively that they consider the act of their Cashier as their own, that they recognize him as their agent, and that the stipulations contained in the contract were made for their benefit and with their approbation. It must consequently have the same force and effect as if it had been entered into under a special authorization or power of attorney. Moreover, the contract under consideration, does not create any new obligation on the part of the bank, the money had already been loaned, before and independent of the said contract, the object of which, on the part of Jones, was merely to secure its reimbursement out of the proceeds of his crop.

Our next inquiry is with regard to the legal effect of the contract and of the delivery of the cotton, under the laws of Arkansas: it is admitted on all hands that the contract in question is neither a sale nor a mortgage. From its features, it appears to us to be in the nature of a pledge, with this difference however that here the pledgee was authorized and required to sell the cotton pledged. This is not an unusual stipulation of common law pledges; before delivery, it was defeasible, but after delivery, the contract became complete, and its effect could not be destroyed by any act of the debtor or by any subsequent proceedings of the pledgor's creditors. It is one of those contracts which are daily resorted to for the convenience of commerce, and which take their effect only from the delivery of the property transferred or pledged for the security of the debt. *Delivery is essential* to its validity; and Mr. Pike, a member of the bar of the State of Arkansas, states in his testimony, that he understands the law of said State to be that even a parol agreement or contract for such a purpose, followed up with a delivery or transfer of the property is legal and binding on the parties thereto; and on third

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Where, in a common law state, a party pledges his cotton crop for a certain sum advanced to him, and the pledgee is authorized and required to sell the cotton for reimbursement: *Held*, that as a pledgee, it was *defeasible before delivery*, but *afterwards*, the contract was complete.

Delivery is essential to the validity of a contract of pledge in a common law state; and even a parol agreement followed by delivery is legal and binding on the parties and third persons.

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In a case of pledge or bailment of goods or personal property, without limitation of time for redemption, the creditor may call on the debtor to redeem after his debt is due, by having a judicial sale, under a decree of foreclosure or upon giving reasonable notice to the debtor to redeem. But the parties, may stipulate as to the time and mode of sale.

persons; and entitles such creditor to be paid by preference out of such property to any subsequent attaching creditor of said debtor, if transferred for a *bona fide* debt.

One of the material distinctions between a *pledge* and a mortgage, is: that a pledge is a deposit of goods redeemable on certain terms, and either with or without a fixed period for redemption. 4, *Kent's comm.*, 132. A pledge is defined to be a bailment or *delivery of goods by a debtor to his creditor*, to be kept till the debt be discharged. 2, *Kent*, 449; *Story on bailment*, No. 286. Where no time is limited for the redemption, the creditor may call upon the pledgor to redeem, and this, under the common law, he may do, after the debt is due, by having a judicial sale under a decree of foreclosure, or he may sell without judicial process upon giving reasonable notice to the debtor to redeem. 2, *Kent*, 452; *Story*, p. 207, sec. 308, 310.—In the present case, the pledgor may be fairly considered as having waived his right to notice by his consenting that the cotton should be sold to satisfy the debt for which it had been pledged, and by thus limiting his right of redemption to his paying the debt previous to the sale of the cotton. *Story*, sec. 317, says: "In speaking of sales by the pawnee, it has been assumed that there is no special agreement between the parties, as to the time or mode of sale, existing, nor any stipulation wholly interdicting any sale. If such an agreement should exist, it must ordinarily regulate the rights of both parties; and neither of them will be allowed to depart from it with impunity." This shows clearly that the parties, may, by a *special agreement* stipulate as to the time and mode of sale, that such an agreement must then regulate their rights, and that it is only in the absence of any such agreement, that the pledgee has to resort to the election of the two remedies pointed out by law to obtain satisfaction of his debt by a judicial sale under a decree of foreclosure or by a sale made after notice given to the debtor to redeem. We agree with the appellees' counsel that the contract under consideration partakes both of the features and character of a pledge and of an assignment in trust,

So a contract, partaking of the features both of a pledge and of an assignment in trust to secure the payment of a debt, is valid in a common law state.

which, as Mr. Pike says, are two of the three modes known to the common law, for securing the payment of debts; and as it has not been shown to be such as to be prohibited by or in contravention of the laws of the state of Arkansas, where the common law prevails, we are disposed to give to it the force and effect which the parties intended it should have, not only at the time of its execution, but more particularly at the time of the delivery of the cotton. This delivery is satisfactorily established by the evidence; no fraud is alleged against it; it is clear that Jones himself could not take back the property without paying the debt; and as the cotton was so delivered and consigned for the purpose of paying a specific debt; the intervenors had thereby acquired upon it, within the knowledge of the plaintiff, such a lien as to entitle them to be paid by preference out of the proceeds thereof. The plaintiff had therefore no right to attach said proceeds, further than the residue, if any, that might remain in favor of the defendant. The principles recognized in the case of *Hepp vs. Glover*, 15 La. Rep., 465, are fully applicable to the present case.

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So where cotton is pledged to secure the payment of a loan of money, and delivered to the agent of the creditor, making the advance, who ships it to be sold for the purpose of paying this loan, it is not liable to an attaching creditor in the hands of the consignee who is made garnishee.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

~~THE STATE OF LOUISIANA~~

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The provision in the charter of the Louisiana State Bank, that two-thirds of the 6 directors on the part of the State, and two-thirds of the 12 elected by the stockholders, only shall be re-appointed and re-elected annually, applies to each class separately; so as to obtain an annual renewal of one-third of the whole board.

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The restriction in the charter confines the re-appointment and re-election to two-thirds of the former board; and directors formerly appointed by the Governor and left out, are ineligible to come in *as new members*, elected by the stockholders.

If a director is *ejected* as *ineligible*, the next highest on the list voted for but left out, is not entitled to his seat. A new election must take place.

This is an appeal from a judgment in a proceeding of *quo warranto*, instituted by F. Jordy to oust P. A. Hebrard as a director in the Louisiana State Bank.

At the election of twelve directors by the stockholders of this institution held the 23d of February, 1841, the defendant, Hebrard, was returned duly elected, being the lowest on the list voted for and returned: and having one vote more than the plaintiff, who was left out. The plaintiff shows that Hebrard is ineligible to a seat in the directory this year, having been a director last year. The charter provides that the board is to consist of eighteen members; six appointed by the Governor and twelve are to be elected by the stockholders; but that only two-thirds of the old board are eligible to re-appointment and re-election. The Governor in making his appointments left out two members of the old board, but *they* with seven of the old board were *re-elected* by the stockholders; making nine members from the old board, when the charter only authorized the election of eight of those who had been directors the previous year, being two-thirds of twelve. That Hebrard being the lowest on the list voted for and ineligible (being already a director) should go out, and Jordy the next *highest come in*. A writ of *quo warranto* was awarded to know by what authority Hebrard continued to hold the office.

The defendant averred he was legally and properly appointed and entitled to hold his office as a director in said bank.

He further showed that the stockholders left out *five* of their former directors at the election in 1841, which was one more than the charter required. He set out the votes and proceedings in the election. The whole case turned on the question, whether C. Toledano and V. Vignaud, who were direc-

tors under an appointment of the Governor for the previous year and were left out in the re-appointments, but were elected by the stockholders could be considered as new members? i. e. to come in as directors elected by the stockholders from among those who had not been previously members?

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The learned judge presiding considered Toledano and Vignaud as ineligible to hold seats at the board of directors; gave judgment vacating their places and ordering a new election to fill their places. They appealed.

Eyma, for the plaintiff.

Grima, for the Bank.

Benjamin, for the defendant, Hebrard.

Bodin, for Toledano and Vignaud, appellants.

Morphy, J. delivered the opinion of the court.

Proceedings were instituted by plaintiff in the court below to test the validity of the election of P. A. Hebrard, as a director of the Louisiana State Bank, at an election held on the 23d of February last by the stockholders. In the progress of the cause, two other directors of the new board were drawn into the controversy and the legality of their election questioned. These directors were Vignaud and Toledano. The judge below being of opinion that they could not be legally elected directors of the Bank for 1841, directed an election to be held for two directors to fill their places. They appealed.

The third section of the charter of this bank provides that the board of directors shall consist of eighteen members, six to be appointed by the Governor and Senate, and twelve to be elected annually by the stockholders; the election by the stockholders to take place on the third Monday after the appointment by the State, *provided however* "that no more than two-thirds of the directors elected by the stockholders and not more than two-thirds of the directors appointed by the Governor

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and Senate, who shall be in office at the time of an annual election shall be elected or appointed for the next succeeding year and no director shall hold his office more than three years out of four in succession. But the director who shall be the President at the time of an election may always be re-appointed or re-elected as the case may be."

In pursuance of this provision, the Governor in January last omitted to re-appoint Vignaud and Toledano, two of the six State directors then in office; in like manner the stockholders left out five of the members elected by them the preceding year, but as at the same time they voted for and elected Vignaud and Toledano, the two directors omitted by the Governor, and the result was that they retained in office nine members of the former board. Of the twelve directors, they elected Hebrard, who was the last on the list, having obtained the smallest number of votes. Jordy, who came next to Hebrard in point of number of votes, contends that as under the charter the stockholders could elect only two-thirds of the old directors, i. e. eight of them, Hebrard is not legally elected and that he (Jordy) must be considered as the twelfth member elected, in order that there should be in the board of 1841 four new directors chosen by the stockholders agreeably to the charter.

The decision of this controversy depends on a just interpretation of the third section of the charter above recited. It is said that the proviso in it does not consider the board of directors as one body, not more than two-thirds of which can be members of the board of an ensuing year, but as consisting of two bodies in *each* of which, one-third shall be left out each year, without reference to the composition of the other; that the charter has been complied with by the State and the stockholders, for they have both left out the required number of old members; that the legislature not having inhibited in terms the election by the stockholders of the two directors omitted by the State, courts are not to infer or imply a prohibition which would restrict their power and right to select for the management of their affairs such persons as they consider most capable; and

that inasmuch as by an interchange of directors between the State and the stockholders the same persons might always remain in office, the additional proviso was added that "no director shall hold his office more than three years out of four in succession." This construction would, in our opinion, entirely defeat the very object of this provision, which we believe was to obtain an annual renewal of one-third of the board. We do not think that the words of the proviso justify the inference that the board is to be considered as composed of two distinct bodies and that the prohibition to appoint more than two-thirds of the old members is to be understood as applying separately to each class of directors without any reference to the other; in other words, we believe that the old members, of whom the State and stockholders are not to elect or appoint more than two-thirds, are all those who were in office at the time of an annual election. If the construction contended for were adopted it might happen, however improbable such an occurrence may appear, and no doubt is, that the State would appoint six of the directors elected the year before by the stockholders, and the latter would take up and elect the six directors not re-appointed by the Governor; thus no change whatever would be made in the composition of the board, and this violation of the charter could be repeated three years in succession; for it would be only on the fourth year that in such a case the whole board would have to be renewed, which total renewal would be an evil perhaps no less great than no change at all. After providing for the annual renewal of one-third of the board, it was no doubt thought that this precaution would be of no avail, if the State and stockholders could every year without any limitation retain in office the same directors to form the other two-thirds of the board. We believe that the proviso restricting to three successive years the eligibility of the directors was inserted with a view to prevent, that notwithstanding the annual removal of members provided for, the affairs of the corporation should constantly remain in the same hands and under the same control. We are confirmed in this view of the subject by an

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act passed on the 6th of March, 1819, entitled, "an act to grant certain privileges to the Louisiana State Bank and for other purposes." The bank had hardly been in operation twelve months when the doubts arose which have produced this controversy, and the same legislature which had so recently passed the charter were called upon to explain their meaning; they have done so in the eighth section of the act alluded to. It declares that "no more than four of the directors of the said bank in office at the time shall be appointed on the part of the State; nor more than eight of the directors for the year next preceding shall be chosen by the stockholders." We understand that this act has never been accepted by the stockholders and is therefore no part of their charter; but it has not the less force as an enactment explanatory of the views and intentions of the law giver. We are therefore of opinion that although the State and the stockholders proceed separately and at different times to choose their directors, yet the board can be viewed but as one body, of which two-thirds only can be continued in office for the ensuing year. If Hebrard, who has the smallest number of votes of the twelve directors elected in February last, is suffered to retain his seat, there will be in the new board thirteen members who were in office the preceding year. But it is contended by the counsel of Hebrard that the illegal composition of the present board results from the circumstance that two of the five members omitted by the stockholders were replaced by the two directors left out by the State; that even if the members rejected by the State for the year 1841 could be elected by the stockholders for the same year, this right of the stockholders must be subordinate to the condition of not electing so many of them as would create in the new board an excess of old members over the number of twelve. It appears to us that when the stockholders are about to re-elect the eight old directors they are permitted to retain in office, all the members of the former board, whether before elected by them or appointed by the Governor, stand before them on an equal footing and with an equal right to re-election. Their

right to choose among all the old members is restricted only by that proviso of the charter that "no director shall hold his office more than three years out of four in succession." It is not pretended that either Vignaud or Toledano have served three years in succession. But if Hebrard cannot be recognized as duly elected, it does not follow that Jordy, who comes next to him in point of number of votes, is therefore to be considered as elected. A new election must take place; such has been, we think, the universal practice and understanding in cases of this kind.

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If a director ejected as ineligible, the next highest on the list voted for but left out, is not entitled to his seat. A new election must take place.

It is therefore ordered and decreed that the judgment of the Commercial Court be reversed; and proceeding to give such judgment as, in our opinion, should have been rendered below; it is ordered and adjudged that the election of P. A. Hebrard as a director of the Louisiana State Bank, made on the 23d of February last be and it is hereby declared null and void; the appellees paying the costs of this appeal.

SLIDELL vs. LOCKE.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

A continuance will not be allowed, because a public officer is called as a witness with his records, at the moment of trial, and shows his records are locked up and his clerk has the key, and is absent at the time.

Where a judgment states the "court being satisfied that the plaintiff's claim is correct," it is a sufficient constitutional reason to support the validity of the judgment.

This is an action on a promissory note signed by the defendant payable to the order of John Slidell, for \$1000, the first day of May, 1840.

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The defendant made a long defence, the substance of which was that the present note, was given for the balance of the price of a lot of ground, warranted free from all incumbrances and liens, but that there is a lien on it for \$173, due the corporation for paving.

On the trial, the defendant called upon the Mayor and City Comptroller to produce the books and accounts of the corporation, to be used as evidence, and was unable to obtain them at the moment, and asked for a continuance, which was refused; he not having used sufficient diligence to obtain the evidence.

There was judgment against the defendant and he appealed.

Slidell, for the plaintiff.

Durell, contra.

Garland, J. delivered the opinion of the court.

This suit is brought to recover the balance alleged to be due on a promissory note, made by defendant to the order of Two-good and by him endorsed. The defendant answered, the note was given to secure the payment of a portion of the price of a lot of ground which, the plaintiff and others had sold him, warranting it free from all incumbrances and liens. He further says the lot is subject to a claim and lien for about \$173 which the Corporation of New-Orleans has for paving the streets and side-walks, in front and rear of it, for which a suit has been instituted in the City Court. This sum he pleads in compensation and reconvention.

After the cause was set for trial, the defendant obtained an order directing the Mayor of the city and the Comptroller of the general sinking fund, to produce in court on the day of trial "all the records of the city in their keeping, which show the date of the paving of the public road now called Front Levee street, also the date of the paving of Clinton street," together with the ordinances relating to paving said streets and laying a tax for the purpose. On the day of trial, the Comptroller appeared and stated, "the records set forth in and called for

by the said subpoena were in his possession and under his control, but that he was not able then to produce the same, his clerk having possession of the key of the safe in which they were kept, and he was absent;" whereupon the defendant moved for a continuance, which being refused, he took a bill of exception.

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We do not think the Judge erred in refusing the continuance. A party does not show sufficient diligence, by merely calling on a public officer to produce his records in court to enable him to make out his defence. He could have procured copies, if the documents were very material. He should have made something more of an effort to make out his case to be entitled to a continuance. The articles 141 and 474 of the Code of Practice authorize the courts to make orders on third persons, in particular cases to produce documents and papers, on the trial of a cause, but the party wishing to use them must show some effort to assist in getting the evidence, to be entitled to delay.

A continuance will not be allowed, because a public officer is called as a witness with his records, at the moment of trial, and shows his records are locked up and his clerk has the key and is absent at the time.

The defendant says the judgment must be reversed, as the Judge does not, according to the 12th section of the 4th article of the constitution refer to the law in virtue of which he gave it, and adduce the reasons on which it is founded. It is stated "the court being satisfied that the plaintiff's claim is correct, order and decree," &c. An objection of this kind, where it is not alleged or shows, that any injury has resulted, is not entitled to much favor. This court has decided that where it is stated, "the plaintiff has made out his case by the law and evidence," it is a sufficient reason.—11 La. Rep. 162. It has been further held, that saying "the jury have found a verdict in favor of the plaintiff" will be deemed valid and constitutional; 11 *Idem*, 565; and in 14 *Idem*, 435, it is said that if the judgment states it was "rendered on due proof of the allegations of plaintiff's petition in which the usual averments of demand, &c." are made, it will be sufficient. In this case the signature to the note is not denied, nor has sufficient diligence been shown to establish the defence; and as it is admit-

Where a judgment states the "court being satisfied that the plaintiff's claim is correct," it is a sufficient constitutional reason to support the validity of the judgment.

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May, 1841. compelled to pay the tax he alleges is owing, we think his
 constitutional defence cannot avail him.

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The judgment of the Parish Court is therefore affirmed with costs.

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The holder or endorsee of a note not yet due, should be placed on the bilan of the insolvent debtor, as a contingent and conditional creditor, and made a party to the *concurso*.

A creditor cannot be made a party to the insolvency of his debtor, if he is omitted to be placed on the tableau, by a supplemental petition, filed after the insolvent proceedings are closed and homologated.

So a creditor who is not put on the bilan and cited, is not bound by the insolvent proceedings even if he is placed on the tableau of distribution, but declines receiving his dividend.

This is an action by the holder or endorsee of a promissory note against the endorser, for the balance due thereon.

The defendant denied being indebted as charged; and averred that he had made a voluntary surrender of his property to his creditors, and by a supplemental petition placed the plaintiff on his schedule; all of which proceedings he pleads in bar to this suit.

The note sued on became due and payable the 28th March, 1840, and the balance due thereon was \$418, and cost of protest. The insolvent proceedings which are pleaded in bar by the defendant were commenced the 19th March, 1838, and closed the 28th March, 1840. Neither the plaintiff or the note sued on are placed on the bilan, or mentioned in the proceed-

ings. This suit was commenced the 6th February, 1841. Subsequently to the homologation of the insolvent proceedings, the debtor filed what is called a supplemental petition, to those proceedings in the Parish Court, which, however seems not to have even been notified to the plaintiff, although filed for the purpose of placing him on his bilan as a creditor by this note.

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May, 1841.

DESRIX
vs.
SCHMIDT.

There was judgment transferring this suit to the Parish Court, there to be cumulated with the insolvent proceedings of the defendant. The plaintiff appealed.

G. Schmidt & Deslix, in propria persona, for the plaintiff and appellant.

Lockett & Micou, for the defendant.

Morphy, J. delivered the opinion of the court.

This action is brought to recover a balance of \$413 34, due on a promissory note drawn by Louis Schmidt to the order of and endorsed by defendant. The defence set up was that defendant has long since made a voluntary surrender of his property to his creditors, and by a supplemental petition has placed plaintiff on his schedule. The Judge ordered that this suit should be transfered to the Parish Court in and for the Parish and City of New-Orleans, there to be cumulated with the proceedings of the *concurso*. The plaintiff appealed.

The note sued on became due and was protested only on the 28th of March, 1840, being the last of four notes given by the maker in payment of a lot of ground purchased by him in April, 1837. At a sale made in November last, of the property surrendered to his creditors by Louis Schmidt, plaintiff became the purchaser of this lot for the sum of \$280; thus reducing his claim against defendant as endorser to the sum now demanded. The surrender of property which defendant pleads in bar of this action was made on the 19th of March, 1838, and the proceedings were finally homologated on the 28th of March, 1840. No where in these proceedings is any mention made of the plaintiff, or even of the note on which

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The holder or endorsee of a note not yet due, should be placed on the bilan of the insolvent debtor, as a contingent and conditional creditor, and made a party to the *concurso*.

A creditor cannot be made a party to the insolvency of his debtor, if he is omitted to be placed on the tableau, by a supplemental petition, filed after the insolvent proceedings are closed and homologated.

So a creditor who is not put on the bilan and cited, is not bound by the insolvent proceedings even if he is placed on the tableau of distribution, but declines receiving his dividend.

this suit is brought. They are clearly then as to him, *res inter alios acta*, and can in no manner affect his rights; although plaintiff could not be considered as an absolute creditor before the protest of the note and due notice to defendant as

endorser, yet he was a contingent and conditional creditor, and as such, should have been carried on the schedule and made a party to the *concurso*. Such was the doctrine of the Spanish law from which we have derived in a great measure our principles and manner of proceeding in cases of insolvency; Febrero, Part. 2, Book 3, chap. 3, No. 14. If it be objected that under the statute of 1817 defendant was bound to set down on his schedule only the names of his absolute creditors and that plaintiff became a creditor long afterwards, the defence set up cannot then avail defendant because this suit is brought to recover a debt which has accrued since his failure, and from the payment of which it could not exonerate him. This case can hardly be distinguished from those of Bainbridge vs. Clay, 3 Martin, N. S. 262; and Thomas et al. vs. Breedlove and others, 6 Louisiana Rep. 575. We can see no proper ground for the order transferring this case to the Parish Court.

We have held, it is true, that if the insolvent be sued by a creditor, not on the bilan, his suit will be cumulated with the proceedings which the insolvent has commenced, but it is evident that this can be done only while the *concurso* is still pending; 4 Martin, N. S. 624. In the present case, the proceedings of the *concurso* were at an end long before the institution of this suit. No cumulation was therefore possible nor could any useful purpose be answered by it; as to the supplemental petition presented by the insolvent even had it been notified to plaintiff, it surely could not have made him a party to proceedings which had already taken place, and of which he had received no kind of notice whatever. It has been held that a creditor who is not put on the bilan and duly cited to attend a meeting of the creditors is not bound by the proceedings, even if he is placed on the tableau of distribution, but declines receiving his dividend; 6 La. Rep. 578.

It is therefore ordered that the judgment of the Commercial Court be reversed, and that this case be remanded for further proceedings; the appellee paying the costs of this appeal.

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May, 1841.

DUFOUR
vs.
BEAUREGARD
ET AL.

DUFOUR vs. BEAUREGARD ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

A power of attorney with a clause "to make and endorse promissory notes in her name, &c.," is clearly sufficient to authorize the *endorsement* of her name and she is bound by it.

This is an action on a promissory note signed by B. Beauregard and endorsed "Therese Palmer, per pro. A. W. L. Palmer."

The defendants severed in their answers. Beauregard admitted his signature but averred he never received any consideration, and that the note was given to A. W. L. Palmer, for the benefit of Therese Palmer; with the understanding that they were to pay it.

Therese Palmer pleaded a general denial and averred she was a married woman and not capable of contracting; and further that the note sued on was not endorsed by her.

On these issues the case was tried.

The plaintiff made proof of the execution of the note; and produced a power of attorney from Mrs. Palmer, separated in property from her husband, to him, authorizing him to transact and manage her business, and especially to *endorse* her name upon individual notes and bills of exchange, &c.

There was judgment for the plaintiff and the defendant, Therese Palmer, appealed.

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DUFOUR
vs.
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ET AL.

Canon, for the plaintiff.

Grymes, for the defendants.

Simon, J. delivered the opinion of the court.

The defendant, Therese Palmer, is sued as endorser of a promissory note, which is shown to have been endorsed by her husband as her agent. Her said husband is also made a party to this suit.

She first pleads the general issue, and avers that the note sued on was not endorsed by her, nor by any one authorized by her to do so. There was judgment in the court below for the plaintiff, and she appealed.

From the production of a power of attorney, passed on the 14th of October, 1836, it appears that the defendant being separated in property from her husband, constituted and appointed him her attorney in fact, general and special, for the purpose of conducting, managing and transacting her affairs, business or concerns of whatever nature; and among other powers, to make and *endorse promissory notes* in her name, &c. This is clearly a sufficient authorization; and in the absence of any other defence, we must conclude that she is bound by the endorsement executed by her husband in her name.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.

M'INTOSH vs. CLANNON.

**EASTERN Dis.
May, 1841.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**M'INTOSH
vs.
CLANNON.**

Where a building contract is modified, at the instance of the proprietor, and a plasterer employed separate from the contract with the builder, he will be entitled to recover of the proprietor independent of the original contract.

The builder is a competent witness to testify in a suit between the plasterer and proprietor, for his wages, when the latter has been employed independent of the building contract.

This is an action to recover the amount of a plasterer's wages.

The facts of the case are sufficiently explained in the opinion of the court.

Kennedy, for plaintiff.

G. B. Duncan, contra.

Morphy, J. delivered the opinion of the court.

This is a claim of \$817, for work and labor done in plastering two houses belonging to defendant. The answer avers that defendant never employed plaintiff to do the work ; that by a contract made with D. H. Twogood, an architect, for the building of these houses, the latter had bound himself to plaster all the interior of them ; that if plaintiff has any claim for his work he must look to the said Twogood, his employer, and not to defendant, who has long since settled for, and paid the price of this work to the said Twogood. The plaintiff had a judgment in the inferior court, from which defendant appealed.

From the building contract it appears that Twogood had bound himself to do all the plastering of the houses, but the evidence shows satisfactorily, we think, that the defendant afterwards proposed that he should employ a plasterer and deduct the cost of this part of the work from the contract price of the houses, and that Twogood agreed to this arrangement, provided, the price of the plastering should not exceed 45 cents per yard. Our attention has been drawn to a bill of ex-

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BOISSIERE.

The builder is a competent witness to testify in a suit between the plasterer and proprietor for his wages, when the latter has been employed independent of the building contract.

ception to the opinion of the judge below in admitting Twogood as a witness to prove the subsequent arrangement by which the plastering was taken out of the original contract. It appears to us that the judge did not err. Twogood stood without interest between the parties; being bound by his contract to do the work; if Clannon paid for it to plaintiff, Twogood was entitled to receive so much less from his contract. He was liable either to plaintiff or to defendant, and parol evidence was certainly admissible to show that since the making of the contract, a second agreement intervened, modifying the first. But independent of Twogood's testimony, other witnesses prove the employment of plaintiff by defendant, and not by Twogood, to do the plastering of these houses. Twogood's clerk testifies, moreover, that in consequence of this new arrangement he deducted the plastering from the contract, and gave defendant a credit on the books for the \$817, now claimed of him.

The judgment of the Commercial Court is therefore affirmed with costs.

FORTINEAU vs. BOISSIERE.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.**

Great forbearance on the part of a creditor and holder towards the maker of a note, but who never appears to have given time so as to preclude himself from suing, and suspending his remedy to the prejudice of the endorser, the latter cannot complain or be exonerated.

Since the adoption of the act of 1823, excluding the testimony of the maker of a note, in a suit by the holder against the *endorser*, the maker cannot be admitted as a witness on any grounds; even if he be entirely *disinterested*.

This is a suit against the defendant, Boissière, and one

Jacques Lefort, as endorsers of two promissory notes, signed by A. Rieffel, the 14th April, 1837, payable one year after date. This suit was instituted the 12th November, 1840, by the holder and endorsee.

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May, 1841.

FORTINEAU
vs.
BOISSIERE.

The defendant, Boissière, pleaded the general issue; and also a peremptory exception, averring he was discharged.—

1. The holder made a contract with the maker by which the debt is novated.—2. That he has given long time to the maker on receiving interest at ten per cent. up to the first of April, 1840; and promising not to sue the maker.—3. Because the holder has novated the debt by a new contract with the maker. Upon these pleadings and issues the case was tried.

The only evidence in support of the defence, is the testimony of Dufour, and of M. V. Labarre, Esqr. which is embodied in the opinion of the court, and need not be recapitulated.

Rieffel, the maker of the note was offered as a witness, and also the proceedings and judgment, in a suit of the present plaintiff against Rieffel and others, on the original notes, for which those now sued on were given. Both the witness and record were rejected and bills of exception taken by the defendant's counsel to the opinion of the court.

There was judgment for the plaintiff and the defendant appealed.

M. V. Labarre, for the plaintiff.

Morel & J. Seghers, for the defendant and appellant.

Morphy, J. delivered the opinion of the court.

This suit is brought on two promisory notes drawn by Rieffel, to the order of, and endorsed by the defendant, amounting to \$4,500 each. The petition contains the usual averments of protest and notice, and acknowledges a partial payment reducing the claim to \$5,515. The defence is that the plaintiff has made a contract with the maker of these notes by which the debt is novated, that he has agreed to wait till

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a distant day without suing him, and has received a certain sum for amount of interest, at the rate of ten per cent. per annum, till the 4th of August, 1840, and that by a new contract entered into with the maker of the notes, the plaintiff has discharged him from all liability. There was a judgment in the court below for the plaintiff, from which the defendant appealed.

If the facts set forth in this answer were clearly shown, there can be no doubt that they would have the effect of discharging defendant from all liability; but the whole evidence taken together hardly creates a presumption of that which should be fully and unequivocally made out.

Dufour, the principle witness of defendant, says that it was understood between Rieffel and Dusuan (plaintiff's agent) that Rieffel would make a lottery of his property; that Dusuan would have the choice of the notes for the payment of plaintiff's debt; that the plaintiff waited until the lottery was drawn, which was two or three months after, and that the notes sued on were given in renewal of two notes bearing mortgage on the property of Rieffel.

Mureville Volant Labarre, another witness for defendant, declares that plaintiff received, on account of the notes in suit, a sum of \$4,000 by his having bought property of the estate of Mrs. Rieffel at auction.

From this testimony, taken in connection with the petition which claims interest on these notes only from the 4th of August, 1840, although they were under protest since 1838, it is contended that an agreement is shown to have existed between plaintiff and Rieffel, the drawer, that the latter should not be sued until the 4th of August, 1840. In order to warrant the conclusion drawn from these circumstances, it should have been shown that the interest was paid in advance and was the consideration given for the delay. We are not informed neither, at what time the \$4000 were received by plaintiff by the purchase of real property. In the absence of any evidence on this head it appears to us reasonable to suppose that this

transaction took place about the 4th of August, 1840, and that this amount of money was imputed on the interest due up to that date, and next on the debt itself. We find in this case great forbearance on the part of plaintiff, but he never appears to have given time so as to preclude himself from suing defendant and suspend his remedy against him to the prejudice of his endorser.

In relation to the alleged contract with Rieffel, by which the debt is said to have been novated, we are without any evidence whatever; but we find a bill of exceptions to the opinion of the Judge who rejected the testimony of Rieffel, the drawer of these notes. It is said that notwithstanding the statute of 1823, excluding the testimony of makers of notes in suits against endorsers, Rieffel should have been heard because he was offered as a disinterested witness, and could have been proved to be such. We think that the Judge did not err. The ground of the rule under which a drawer was admitted to testify in a suit against an endorser was a want of interest supposed to exist on account of his ultimate responsibility, whatever might be the result of the suit. Notwithstanding such was the well known reason of the rule, the legislature has thought proper to prohibit in the clearest and strongest terms the admission of *drawers* as witnesses in suits against *endorsers*; and although the grounds of this prohibition are not very apparent to us, we are bound to suppose that it is based on considerations unconnected with the question of interest. But be this as it may, the letter of the law is too plain and imperative to be disregarded by us. In another bill of exceptions the defendant complains that the Judge rejected as irrelevant, certain proceedings which had been instituted by plaintiff, in the District Court, on the mortgage notes of which those now sued on were renewals. From the facts set forth in the bill of exceptions, we cannot say that the Judge erred.

It is therefore ordered that the judgment appealed from be affirmed with costs.

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May, 1841.

FORTINEAU
vs.
BOISSIERE.

Great forbearance on the part of a creditor and holder, towards the maker of a note, but who never appears to have given time so as to preclude himself from suing, and suspending his remedy to the prejudice of the endorser, the latter cannot complain or be exonerated.

Since the adoption of the act of 1823, excluding the testimony of the maker of a note, in a suit by the holder against the endorser, the maker cannot be admitted as a witness on any grounds; even if he be entirely disinterested.

CASES IN THE SUPREME COURT

EASTERN Dis.
May, 1841.

OLIVIER, Curator, &c. vs. CANNON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

OLIVIER,
CURATOR, &c.
vs.
CANNON.

In actions of tort which from the nature of the demand, damages are to be assessed, a jury must be summoned to find the same. The court alone cannot assess damages in such cases.

This is an action to recover an old slave, horse and dray, valued in the inventory at \$331, and damages for the tortious taking and illegal detention of the same. The plaintiff alleges the defendant took said property and detains it without any reason or title whatever, which belongs to the estate he administers. He prays judgment, restoring the possession of the property, and 500 dollars in damages; and that in the mean time the slave, horse and dray be sequestered.

There was a judgment by default, made final, restoring the possession, and allowing \$25 per month for the time of the slave from the 6th May, 1839, until delivery. Judgment signed June 8th, 1839. The defendant appealed.

Grandmont, for the plaintiff, urged the affirmance of the judgment with costs and damages.

Eggleston, for the appellant, assigned as error that damages were assessed without the intervention of a jury, and for this reason alone judgment must be reversed; *Code of Pr. art. 313*.

2. Damages could only be given from the date of citation on the 8th May, and ceased to run from the time of rendering judgment.—2 La. Rep. 404; 1 Martin, N. S. 574; 1 Gallison 315.

3. A judgment cannot be rendered for any matter *posterior* to its rendition; 5 La. Rep. 225.

4. The judgment is unconstitutional for not assigning reasons, and referring to the law.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment by default, on a

charge of his having tortiously taken and detained a slave, horse and dray, belonging to the plaintiff. He assigns as error apparent on the face of the record, that the damages claimed were assessed by the court without the intervention of a jury.

EASTERN DIS.
May, 1841.

PARLANGE
vs.
HIS CREDITORS.

It appears to us that this assignment of error must prevail. The action is instituted for a *tort*, and the Code of Practice requires, "that whenever from the nature of the demand, *damages are to be assessed*, the court will direct a jury to be summoned to find the same, in the same manner as if the defendant had answered."—*Art. 313*.

In actions of tort, which from the nature of the demand, damages are to be assessed, a jury must be summoned to find the same. The court alone cannot assess damages in such cases.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, so far as relates to the question of damages;—and that the case be remanded for further proceedings according to law:—but in all other respects affirmed;—the plaintiff and appellee paying the costs of the appeal.

PARLANGE vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Under the act of 25th March, 1808, for the benefit of insolvent debtors in actual custody, any creditor, at any stage of the proceedings, may make a charge and suggestion of fraud, to which the debtor must plead, and the issue is to be tried by a jury.

The debtor cannot avoid this issue by denying the creditor's right to vote for or against his discharge because his claim is not proven by a notarial act, &c. There is nothing in the law requiring the creditor to give his vote before filing the suggestion of fraud therein alluded to.

The plaintiff being in custody under two executions, made application for the insolvent law of 1808, for the benefit of

EASTERN DIS. debtors in actual custody. He filed his petition and schedule,
May, 1841. and prayed to be released from custody.

PARLANGE Wallet and Populus, the two creditors who had arrested the
vs.
HIS CREDITORS. insolvent, made opposition and suggested fraud; alleging he
 had not made a fair surrender, but had retained valuable furniture, credits or debts due to him, &c. They propounded interrogatories touching the matters charged as fraudulent which were promptly answered; the insolvent stating in explicit terms he had made a fair surrender of all his property. He took a rule to set aside the oppositions and to be discharged from custody.

The judge was of opinion the oppositions should be tried; and for this purpose ordered a collateral issue to be made up on the charge or suggestion of fraud to be tried by a jury. The insolvent debtor appealed.

Preaux, for the plaintiff and appellant, relied on the first section of the 25th March, 1808; 1 Moreau's Dig., *verbo insolvent debtors*.

2. The oppositions should be set aside, because they are not sworn to. An affidavit is required in such cases.

3. The opposing creditors have not shown they are creditors by notarial acts, or other authentic proof.

Castera, for the opposing creditors and appellees, urged the affirmance of the judgment of the District Court. It was in accordance with law.

Simon, J. delivered the opinion of the court,

This is an appeal from an interlocutory judgment ordering a collateral issue for the purpose of trying before a jury certain charges of fraud made against the petitioner by two of his creditors.

The appellant, an insolvent debtor in actual custody, having claimed the benefit of the laws of insolvency under the act of the 25th of March, 1808, his creditors consented to his release. On the same day that the creditors' votes were received, two

judgment creditors, H. Wallet and B. Populus, who had not exercised their right of voting for or against his said release, filed their allegations of fraud against the insolvent, and propounded him interrogatories which were immediately answered. Some short time afterwards, the insolvent obtained a rule on the opposing creditors, to show cause why their oppositions should not be set aside, and why the petitioner should not be discharged from imprisonment, on the ground that no creditor has any right to vote in favor or against the release of an insolvent debtor in actual custody, if his claim is not proven by a notarial act or by some other collateral proof supported by the oath of said creditors, and that no notarial act or oath was presented before the court at the meeting of the creditors in open court on the day the oppositions were filed. The court below discharged the rule, and the insolvent appealed.

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May, 1841.

PANLANGE
VS.
HIS CREDITORS.

The same ground is now insisted upon before us, and we are referred to the *first section of the act of the 31st March, 1808, 1 Moreau's Dig., 573*. It is true that under this section, no creditor of an insolvent debtor has any right of voting for or against his release, unless he proves his debt in the manner therein set forth, so as to satisfy the court as to the nature and origin of the debt, and to leave no doubt of its reality; but the *sixth section of the act of the 25th March, 1808*, provides that "when fraud is presumed or charged by any one of the creditors in any stage of proceedings had before the court, the judge shall direct a collateral issue to try the same before the jury, and for that purpose, *a suggestion shall be filed in which the facts to be relied on, shall be stated* and the debtor shall plead to the same." We consider this *proviso* as being particularly applicable to the present case, and there is nothing in it that requires the creditor to give his vote before filing the suggestion of fraud therein alluded to; this may be done at any stage of the proceedings had before the court previous to the definitive discharge; and we are not aware that such suggestion ought to be supported by the same kind of proof as may be necessary to give to the creditor the right of voting.

Under the act of 25th March, 1808, for the benefit of insolvent debtors in actual custody, any creditor, at any stage of the proceedings may make a charge and suggestion of fraud, to which the debtor must plead, and the issue is to be tried by a jury.

The debtor cannot avoid this issue by denying the creditor's right to vote for or against his discharge because his claim is not proven by a notarial act, &c. There is nothing in the law requiring the creditor to give his vote before filing the suggestion of fraud therein alluded to.

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May, 1841.

PARLANGE
vs.
HIS CREDITORS.

By alleging fraud, the creditor gives no vote, he merely makes an opposition to the release of the debtor, founded on distinct and specified facts which he must prove and substantiate, and which, if not established, will not prevent the debtor's being forthwith discharged from the custody of the sheriff; whilst on the contrary, the vote of a creditor, being the expression of his consent or refusal to the release applied for by the insolvent, is to be counted among those who are for or against his demand, and is to have the effect of controlling a minority which perhaps would not exist in the absence of such vote. This is undoubtedly the reason why the law, for the protection of the other creditors, and to prevent collusion between the debtor and a pretended creditor, wisely requires the production of such proof as to leave no doubt of the reality of the debt due to the person who wishes to exercise the right of voting. Here, there is ample proof of the opponents being judgment creditors, they are carried on the bilan as such, and it also appears that the appellant, at the time of his surrender, was in actual custody by virtue of the judgments obtained against him by the appellees. This was sufficient to entitle the opponents to file their suggestion of fraud, and we are of opinion that the rule under consideration was properly discharged.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

COMSTOCK ET AL. vs. PAIE & SMITH: Bartlette garnishee. EASTERN Dis.
May, 1841.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

COMSTOCK ET AL
vs.
PAIE & SMITH.

The disclosure of the time of receiving and paying over certain monies by an attorney, who is garnisheed, which he had received on account of his client, cannot be objected to as disclosing professional secrets.

So, where the attorney when cited, as a garnishee, to answer interrogatories, requiring him to state, if he had not received certain money of his client, and if he had and had paid it over, to state when he paid it, and to whom, and he refused to answer, on the ground that it would be disclosing professional confidence: *Held*, that he was bound to answer, and his *refusal* was an *evasion*, making him liable for the whole debt, costs and damages.

This appeal comes up from a judgment obtained by the plaintiffs against the garnishee in this case.

The plaintiffs had recovered a judgment for \$728 against Antonio Paie, one of the defendants, as the value of certain flour they had sold to him and Smith, for cash, but which had not been paid, and which was sequestered, and bonded by the defendant, Paie, with Bartlette, the garnishee, as surety.—This judgment was signed the 30th May, 1839. The flour was sold by the sheriff and the proceeds paid over to Bartlette the attorney of Paie and surety on his bond.

On the 19th July, 1839, the plaintiffs filed their petition against Bartlette, praying that he be cited as garnishee, and required to answer on oath the following interrogatories:

1. "Did not the sheriff of New-Orleans pay over to you as the attorney of Paie, the said sum of \$728, the proceeds of flour sequestered, as aforesaid; and did you ever pay it over? Is not the money under your control, or in your possession?"

2. "Before you received said money had not Paie left New Orleans, and has he ever since been in this city to your knowledge? If you have paid it over, state when you paid it, and to whom did you pay it?"

The garnishee excepted to the legality of the interrogatories; especially the second, and objected to answer, on the ground that the law did not authorize such interrogatories or require a garnishee to answer them.—Further, that he cannot

EASTERN DIS. answer the same without disclosing matters and instructions
May, 1841. confided to him in professional confidence. He prayed to be
COMSTOCK ET AL excused from answering.

vs.
PAIE & SMITH.

In answering, the garnishee states, "the sheriff did not *pay* over to him as the attorney of Paie, the said sum of \$728, the proceeds of flour sequestered; but the amount he did *receive* from the sheriff in his capacity of attorney for Antonio Paie, being as well as he recollects, \$703 69, and no more, which he understood had been left with the sheriff by the aforesaid plaintiffs, as the proceeds of the flour sequestered and sold by them; and which they had been ordered by a decree, rendered by the court, to deliver to defendant, Paie, on bond, was received by me in pursuance of said decree, by virtue of instructions from said Paie, and almost immediately by me paid over and disposed of according to further instructions, I had received thereof concerning, from said defendant, Antonio Paie. The money is not now and was not at the time the above mentioned interrogatories came to my hands, or at any other time since, under my control, or in my possession."

"To the second interrogatory, I object to answer for the reasons set forth in my exceptions thereto."

The plaintiff now took a rule on the garnishee to show cause why judgment *pro confesso* should not be rendered against him, for not answering the interrogatories propounded; and further, that the exception and answer be overruled. After some further proceedings there was a judgment overruling the exceptions: and also, on the rule taking the interrogatories for confessed, under article 263 of the Code of Practice, against the garnishee, for the amount of the plaintiff's entire demand. The garnishee appealed.

Eggleston, for the plaintiffs and appellees.

Bartlette, in *propria persona* for appellant.

Martin, J. delivered the opinion of the court:

This is an attachment case. Judgment was obtained against the defendants for the sum of seven hundred and twenty-eight dollars; and T. A. Bartlette, the garnishee, is appellant from a judgment rendered against him for this amount of defendants' funds in his hands, in pursuance of the 263d article of the Code of Practice which provides that the refusal of a garnishee to answer interrogatories shall be taken as evidence of his having funds sufficient to satisfy the plaintiffs' demand, and judgment shall be given against him for the whole amount thereof.

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The garnishee in his answer to the first interrogatory, admitted that he had received a sum of money on account of Paie, one of the defendants, whose attorney he was, but added that he had almost immediately paid it over according to his client's instructions.

The second interrogatory is in these words:—"Before you received said money had not Paie left New-Orleans? and has he ever since been in this city to your knowledge? If you have paid it over; state when you paid it; and to whom did you pay it?"

This interrogatory the garnishee refuses to answer. He contends that the law does not authorize such interrogatories, nor make it incumbent on a garnishee to answer such questions; and that he cannot answer the same without disclosing matters and instructions confided to him in professional confidence.

The garnishee was required to state at what time he paid the money. The plaintiffs wished to ascertain this fact, in order to charge him, if the payment was made after the service of the attachment. The precise time was within his knowledge, necessarily and independently of any communication he might have received from his client. Admitting that there may be something in his objections to any other part of the interrogatory, ingenuity itself cannot suggest any objection to the disclosure of the *time* of paying over this money.

We regret to see a member of the bar seeking to avoid the

The disclosure of the *time* of receiving and paying over certain monies by an attorney who is garnisheed, which he had received on account of his client, cannot be objected to as disclosing professional secrets.

So, where the attorney, when cited as a garnishee, to answer interrogatories, requiring him to state, if he had not received certain money of his client, and if he had, and had paid it over, to state *when* he paid it, and to whom, and he refused to answer, on the ground that it would be disclosing professional confidence: *Held*, that he was bound to answer, and his refusal is an evasion, making him liable for the whole debt, costs and damages.

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May, 1841.

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vs.
COCKE.

payment of a sum of money unjustly withheld by a bare-faced resort to such shameful evasions under the pretence of a scrupulous regard for professional obligations. Judgment was therefore correctly given against the appellant for the entire amount of the plaintiffs' claim; and they are further entitled to the ten per cent. damages which they claimed as for a frivolous appeal.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs and ten per cent. damages.

PURDEE vs. COCKE.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Where an amended petition was filed with a new affidavit and bond, correcting the name of the defendant, but no new order of attachment was granted: *Held*, that the attachment issuing thereon is a nullity.

This suit commenced by attachment. The petition was filed the 25th of January, 1841, in which the plaintiff alleges that one Charles F. Cocke is indebted to him in the sum of \$800, as overseer of his plantation; and being the balance due on an order or draft of defendant in his favor drawn on R. Eggleston. A writ of attachment issued according to the prayer of the petitioner.

On the 30th of January, by leave of the court, the plaintiff filed an amended petition, accompanied by a new affidavit and bond, alleging that he had sued the defendant by the wrong name through mistake, and that his true name was "Chastine Cocke." He prayed that a writ of attachment issue

against the defendant, Chastine Cocke. The writ of attachment issued without any order.

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May, 1841

A rule was taken on the plaintiff to show cause why the attachment should not be set aside on the ground that no order for issuing it had been granted. On hearing the parties the rule was discharged.

FURBER
vs.
COCKE.

There was judgment for the plaintiff and the defendant by his attorney appealed.

Peyton & I. W. Smith, for the plaintiff:

1. The court below properly overruled the motion to dismiss the attachment. No order to issue the attachment was necessary. The clerk is authorized to issue the writ, *see act of March 25th, 1828, sec. 18*. If any order were necessary it would be an order from the clerk directed to himself. Besides if any order should be deemed necessary, the order of the court directing the amended petition to be filed may be considered as one.

2. The testimony proves that the order sued on was drawn in Mississippi by the defendant upon his agent residing there, to be paid by money to be received by the latter from a debtor of the former; and that what was received was paid over and credited on the order. More than four months afterwards the defendant recognized this debt in his letter, and promised that he and his partner "will make the draft good."

3. The order sued on is not a bill of exchange: if it were, the testimony shows that the drawer had no funds. If notice were necessary the letter of the defendant afterwards admits the debt and proves clearly he knew the draft was not paid, and yet he promises that he and his partner will at all events make the draft good. If the drawee had no funds then no protest or notice to the defendant was necessary.

Maybin, for the defendant and appellant:

1. That the first order of attachment having been issued against Charles F. Cocke, no order of attachment has been

EASTERN DIS. issued against the defendant under his real name as Chastine
May, 1841. Cocke.

PURDIE
vs.
COCKE.

2. No proof of the non-payment, and legal notice to the defendant of the non-payment of the order or bill of exchange sued on is given.

3. The defendant has not waived the necessity of such proof, for the letter of the defendant does not prove the identity of the order, and that he knew that said notice had not been given.

4. If responsible at all, the defendant must be only for his share or one-half.

Morphy, J. delivered the opinion of the court.

This suit had commenced by attachment against Charles F. Cocke. A few days after, plaintiff presented a petition stating that through error, defendant's name had been set forth as Charles F. Cocke, when in fact his true name was Chastine Cocke, and asking that the original petition should be amended accordingly. A new affidavit and bond were annexed to this petition, and a writ of attachment was prayed for against Chastine Cocke; leave of the court was obtained to file the amended petition, but no order for the issuing of the second attachment was given either by the judge or by the clerk of the court below. A motion was made to set aside the proceedings on the ground that they were not authorized by any order of the court, and were therefore illegal and void. This motion was overruled below, but it has been renewed and insisted on here by the counsel appointed to represent the absent debtor. It is contended on the part of plaintiff and appellee that no such order was necessary; that the 18th section of the act approved on the 25th of March, 1828, which gives to the clerk the right of issuing orders of arrest, attachment, &c., authorizes him to issue the writs himself, without the vain and useless ceremony of making an order directed to, and to be executed by himself. We cannot give our assent to this proposition. It would be doing away entirely with the necessity of

an order in every case, which is contrary to the very terms of the statute, which provides, "that the orders of arrest, attachment, provisional seizure and injunction, &c., may be issued either by the judge before whom the cause is brought or by the clerk of his court, provided that the parties applying for the same comply with the formalities prescribed by law to obtain any of the above mentioned orders." Before this enactment none of these extraordinary remedies could be obtained without an order of the judge. The only change made by this law is to give to the clerks of courts concurrently with the judge, the power of making such orders; but from the very wording of this amendment it is apparent that the judicial order theretofore required for the issuing of these several writs was not intended to be dispensed with. The order authorizing the issuing of a writ and the writ itself are distinct and different things. The one is a judicial act determining the amount of the bond to be given, accepting the surety offered, &c.; the other is the performance of a ministerial duty. An order when issued by the clerk under this express law is to be considered an order of the court as much as if given by the judge himself. It is therefore an order of court, which the clerk executes and not his own, when he issues the writ which it authorizes. The plaintiff seems to have been fully aware that an order was necessary for the record shows that he took care to have one made out by the clerk when he filed his original petition. The second attachment sued out against Chastine Cocke being a distinct proceeding from the first should have been attended by the same formality. It must stand by itself and can derive no validity or support from the order authorizing the previous attachment against Charles F. Cocke. Plaintiff having treated the first attachment as a nullity and prayed for a new writ, it could not lawfully issue without an order of the court. In *Lacy vs. Kenley*, 3 Louisiana Reports, 18; we have said "whatever may be the general doctrine of nullity, relating to contracts or judicial proceedings, in ordinary cases, it is believed that in the extraordinary remedy by attachment

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Where an amended petition was filed with a new affidavit and bond, correcting the name of the defendant, but no new order of attachment was granted: *Held*, that the attachment issued thereon is a nullity.

EASTERN DIS. all the forms prescribed by law for this process must be strictly pursued, on pain of nullity, as a consequence of their neglect."
May, 1841.

BLANCHARD
vs.
VARGAS ET AL. It is therefore ordered that the judgment of the Commercial Court be avoided and reversed, and it is further ordered that there be judgment for the defendant as in a case of non-suit with costs in both courts.

BLANCHARD vs. VARGAS ET AL.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW ORLEANS.**

The rights of garnishees and their liability to pay, does not depend on privileges or preference, but on their answers to the interrogatories propounded by the plaintiffs; subject however to be disproved.

Where the garnishee's answer states he has a certain amount of defendants' property in his possession upon paying him \$468, he will be entitled to retain this sum when his answer is not disproved.

This is an action for the balance of account due by the defendant, who resides in Havana. Jean Ignacio Laborde was cited as garnishee and required to answer interrogatories. These he answered as set forth in the opinion of this court.

There was judgment against the defendant for \$3,105. A rule was then taken on this garnishee to show cause why he should not be condemned to pay the amount of the judgment.

There was judgment on the rule recognizing \$1865 94, to be in the hands of the garnishee, one half of which he was required to pay to the plaintiff, according to a certain agreement. The garnishee appealed.

I. W. Smith, for the plaintiff and appellee.

Schmidt, for the appellant.

Simon, J. delivered the opinion of the court.

This is a suit by attachment. Jean I. Laborde, one of the garnishees, complains that judgment was rendered against him in favor of the plaintiff and another attaching creditor of the defendant, for the sum of \$1865 94, whilst he ought to have been allowed the credit of a sum of \$468, which the defendant owed him at the time the attachment issued. The appellant having been interrogated on oath as to what property, monies, rights or credit which he had in his hands belonging to the defendant, answered: 1. That on the day of the service of the process of attachment he had in his possession a bill of exchange, which has been since paid, and the nett proceeds of which amount to \$987 50; and also fifty thousand segars valued in the invoice at \$878 44, which property belongs to the defendant, Vargas, upon paying the respondent \$468, and leaving a balance due him of \$1400 61, on the supposition that the segars produced the invoice price after deducting commission, storage and other incidental expenses, and that he has no other property, effects, monies or any thing else belonging to said Vargas. 2. That at the time of the service of the process of attachment, he was not otherwise indebted to said Vargas than is already set forth in his reply to the first interrogatory; and further that either shortly prior to the service of the attachment or about the same time, another attachment was served upon him, by the district court, in the suit of Mateo Lopez vs. Jose Vargas, together with interrogatories, while the interrogatories in the present suit were not served upon him till two days afterwards, to which fact he adverts in order to protect himself from injury in the event of conflict between the respective claimants. The parish judge ordered one half of the amount (\$932 97) to be paid to the plaintiff, the other half being for Mateo Lopez, under an agreement on file between the two attaching creditors.

It is contended by the appellee's counsel, that if the garnishee had a privilege and preference over the plaintiff, he should have filed his intervention or third opposition and supported it by evidence; and that his answer does not disclose any facts which authorize any such privilege.

EASTERN DIS.
May, 1841.

BLANCHARD
vs.
VARGAS ET AL.

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The rights of garnishees and their liability to pay does not depend on privilege or preference, but on their answers to the interrogatories propounded by the plaintiff; subject however to be disproved.

Where the garnishee's answer states he has a certain amount of defendants' property in his possession, upon paying him \$468, he will be entitled to retain this sum when his answer is not disproved.

It seems to us that this is not a question of privilege or preference, and that the rights of the garnishee or his liability to pay merely depend upon his answers to the interrogatories propounded to him by the plaintiff. He was called upon to answer those interrogatories according to the *arts. 247, 250, 262, 263, and 264 of the code of practice*; under those articles, the garnishee was bound to answer clearly and categorically, and if he refused or neglected to do so, such refusal and neglect was to be considered as a confession of his having in his hands, property of the defendant sufficient to satisfy the demand; the plaintiff however is permitted to disprove the facts stated by the garnishee in his answers and to show that they are false.

In this case, no such attempt has been made, and therefore, as this court has held in the case of *Oakey et al. vs. Miss. and Ala. R. R. Co.*; 13 *La. Rep.* 570, "The extent of the garnishee's liability is *to be tested by his answers* to the interrogatories, the truth of which has not been disproved." And it is clear that the plaintiff must abide by those answers, unless he excepts to them or attempts to contest them by proving that they are untrue. 14 *Idem* 514. If this doctrine is correct and we do not think it can be controverted, does it not necessarily follow from the answer of Laborde, that the amount in his hands was subject to be applied to the payment of the sum of \$468 at the time the attachment issued? He states positively that the property in his hands belongs to the defendant, *upon paying him* (the respondent) the said sum of \$468. It is true that he does not explain how and why this credit is to be allowed, but the plaintiff had the means, by propounding him additional interrogatories, to ascertain the nature and origin of the said credit; as the case stands, those answers make full proof of the facts therein contained; and if on the one hand, the plaintiff is to have the legal benefit of them, to secure the recovery of his demand; on the other hand, they cannot be divided, and must also serve for the protection of the garnishee's rights, unless regularly excepted to as insufficient and unsatisfactory, or disproved in the manner pointed out by law. In

the case of *Burke et al. vs. Taylor et al.*; 15 *Idem* 237, the answers of the garnishees were specially excepted to as evasive and insufficient, and it became then the duty of the court to pronounce on the sufficiency of those answers, and on the right assumed by the garnishees to pay themselves in preference to the plaintiffs. In the present case, the rule taken upon Laborde affords him no intimation of the grounds on which he is sought to be made liable for the whole amount, and as our laws do not require an answer in writing to rules taken upon garnishees, 3 *Idem* 570, the only issue before the court resulted from the answers of the appellant against which nothing had been alleged or attempted to be shown; and those answers were the only evidence upon which the inferior tribunal had to fix the amount in the hands of Laborde subject to the satisfaction of the plaintiff's judgment.

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May, 1841.

BLANCHARD
vs.
VARGAS ET AL.

We conclude that the judge *a quo* erred in dividing the appellant's answers to the interrogatories, and in not limiting his liability to the balance therein shown to belong to the defendant.

With regard to the segars, we agree with the court below that as the garnishee has not shown the amount produced by the sale thereof, nor the expenses which may have been incurred thereby, he must be considered as having in his hands the sum by him stated in his answers to the interrogatories to be the value of said segars. It was his duty to account for them, since the sheriff had left them in his possession.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be annulled, avoided and reversed, and proceeding to give such judgment as, in our opinion, ought to have been rendered by the lower court, it is ordered, adjudged and decreed that Ignacio Laborde pay to the plaintiff, one half of the amount by him acknowledged to be in his hands belonging to the defendant, to wit: seven hundred dollars and 30½ cents, with costs in the court below, those in this court to be borne by the appellee.

CASES IN THE SUPREME COURT

EASTERN Dis.
May, 1841.

GAILLARDET *vs.* DEMARIES.

GAILLARDET
vs.
DEMARIES.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

18L 490
47 1658

18L 490
104 160

To render the employer or hirer of a slave liable for the damage occasioned by him, it must be done through his neglect, while he is actually engaged in the functions or duties intrusted to him.

Where the damage is done wilfully and wickedly by a slave hired to another, instead of doing it through neglect or unskilfulness, the employer is not liable.

The employer is however liable for damage occasioned through the neglect, imprudence or unskilfulness, of his employee, whether he be a free person or a slave.

This is an action of damages, in which the plaintiff claims \$600, for injury and damages sustained, by the negligent and unskilful conduct of a slave, in driving a dray against his gig, breaking it to pieces and injuring his servant.

It appears a slave hired by the defendant, in his employment driving a dray, and being in a full trot, ran against the plaintiff's gig and broke it; doing also serious injury to the servant driving it.

The evidence was clear that the damage was occasioned by the neglect and unskilful driving of the drayman, and that he was hired and put in this employment by the defendant. It further appeared that the servant driving the plaintiff's gig did not belong to him.

The Parish Judge assessed the damage done to the gig at \$200; the driver not belonging to the plaintiff, he was not entitled to any remuneration for the injury done him.

The defendant appealed.

Preaux, for the plaintiff.

Castera & Pepin, for the defendant and appellant.

Morphy, J. delivered the opinion of the court.

This suit was brought to recover damages for injury sustained by plaintiff whose gig was upset and considerably damaged by a dray belonging to the defendant. It is alleged

that the boy who was driving the dray also belonged to the defendant, and that the accident was the result of his neglect and carelessness. After denying generally the facts alleged; the answer avers that defendant cannot be liable because the slave who occasioned the damage is not his property. There was a judgment below in favor of plaintiff for \$200. Defendant appealed.

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May, 1841.

GAILLARDET
VS.
DEMARIES.

The evidence shows that the boy who was driving defendant's dray did not belong to him, but was hired by him from some other person whose name has not been disclosed even on the trial; and that the accident which gives rise to the present claim happened through his neglect and want of proper care and attention.

The defendant contends that the owner is alone responsible for any damages occasioned by a slave; that as he only hired this slave he is not to answer for such of his acts as may cause injury to others; and we have been referred to those articles of the Louisiana Code which declare the liability of masters for the offences and quasi offences of their slaves, La. Code, arts. 180 and 2300. It appears to us that defendant's liability in this case rests on grounds altogether distinct from those which are the basis of the responsibility of the owners of slaves under the foregoing provisions of our Code. The liability of the masters of slaves is a consequence of their ownership. It is one of the burthens of this species of property; it is absolute and exists whether the slave is supposed to be acting under their authority or not; the only difference lies in the extent of this responsibility. If the offence or quasi offence which occasions the injury is committed by the slave without the order of his master, the latter may exonerate himself by surrendering the slave to be sold; while he will be answerable for any amount of damages, if the slave has only acted in obedience to his orders. The provision of law on which plaintiff relies, as applicable to this case, is article 2299 of the Louisiana Code. It provides that "masters and employers are answerable for the damage occasioned by their servants and

EASTERN DIS.
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DEMARIES.

To render the employer or hirer of a slave liable for the damage occasioned by him, must be done through his neglect, while he is actually engaged in the functions or duties intrusted to him.

Where the damage is done wilfully and wickedly by a slave hired to another, instead of doing it thro' neglect or unskilfulness, the employer is not liable.

The employer is however liable for damage occasioned through the neglect, imprudence or unskilfulness, of his employee, whether he be a free person or a slave.

overseers in the exercise of the functions in which they are employed." The circumstance of the person employed being a slave instead of a free person, cannot, in our opinion, vary or change the responsibility of the employer; for it rests on the ground of express or implied authority from him, but in order to hold the employer liable, the damage must be done through the neglect of the slave hired while he is actually engaged in the functions or duties intrusted to him. If the negro in this case had wilfully and wickedly run his dray against plaintiff's gig, instead of doing it through neglect or unskilfulness, defendant could not have been made liable, because the damage could not be said to have been done in the course of his employment or under any implied authority from him. When the acts of an agent which do injury to others are wilful and deliberate, he must answer for his own misbehaviour. If he be a slave against whom no action can lie, the law substitutes for his responsibility that of his master; but when the damage has been done by the imprudence, unskilfulness or ignorance of a person employed by another to do a certain thing, the employer is responsible whether the agent is a free person or a slave. In this case the plaintiff had, we think, an action against both the owner and employer of the slave. Had defendant thought proper to let plaintiff know the name of the person from whom he hired this slave, he might perhaps have saved himself the trouble and expense of this suit; not having done so, he cannot complain if he alone is looked to for indemnity. The injury sustained by plaintiff being proved to have happened through the neglect and carelessness of the boy while he was driving a dray by order and for account of defendant, the latter is clearly liable under article 2299 of the Louisiana Code. As to the injury suffered by the negro who drove the plaintiff's gig, damages were rightly disallowed, because it is in evidence that he does not belong to plaintiff.

The judgment of the Parish Court is therefore affirmed with costs.

KAISER vs. HOFFMAN.

**EASTERN Dis.
May, 1841.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF JEFFERSON.

**KAISER
vs.
HOFFMAN.**

The curatorship must be given to a creditor of the deceased, in preference to a person who is not such, but only alleges he was a *friend*.

A person to whom any house rent is due by the deceased is a creditor and will be preferred for the curatorship, to a stranger.

The party failing in his application for curatorship of an estate, through the opposition of another or otherwise, must pay the expenses of the contestation.

The appellant, Hoffman, applied for the curatorship of the vacant estate of Jacob Schert, deceased, alleging he was a *friend* of the deceased.

Jacob Kaiser made opposition, averring he was a friend and also a creditor of said decedent.

There was a bill of exceptions taken to the answers of Kaiser to interrogatories propounded to him in open court by Hoffman, touching the rent due him. He was asked if the deceased owed him any thing for house-rent during the month of August, 1839; the answer was that the deceased paid him for the month of August and up to the 1st of September, 1839, all he owed him for house-rent. Kaiser's counsel then asked him whether he was a creditor of the succession for house-rent, to which question Hoffman's counsel objected on the ground that Kaiser could not interrogate himself through his own counsel, and that he could explain no farther than what was connected with the rent during the month of August, 1839. The court overruled the objection and added, that Kaiser when stopped in explaining had stated that in fact his house-rent was paid up to the 1st of September, 1839, but there was a balance due him for rent from the date last mentioned to the day of the death of the deceased.

There was judgment sustaining the opposition of Kaiser and appointing him curator. The defendant and applicant appealed.

M. Kinney, for the plaintiff and opponent.

Greiner, for the defendant and applicant.

Martin, J. delivered the opinion of the court.

EASTERN Dis.
May, 1841.

KAISER
vs.
HOFFMAN.

John Hoffman is appellant from a judgment of the Court of Probates sustaining the opposition of Kaiser to his application to be appointed curator to the estate of Jacob Schert, deceased. He claimed the curatorship on the ground that he was a *friend* of the deceased.

The curatorship must be given to a creditor of the deceased, in preference to a person who is not such, but only alleges he was a *friend*.

The claim of Kaiser was urged on the ground that he was a friend and *creditor* of the deceased.

The Judge of Probates sustained the opposition, being of opinion that the quality of *creditor*, in addition to that of *friend*, turned the scale in favor of the opponent.

The Louisiana Code, article 1114, gives the preference of the curatorship to creditors over those who are not; when no surviving partner, heir or spouse is an applicant.

Kaiser claimed to be a creditor for rent. Hoffman, the adverse party, interrogated him to say whether any rent was due for the month of August, 1839; and he answered in the negative. When his counsel asked him whether there was any thing due him for house-rent, the question was objected to by Hoffman's counsel, but the objection was overruled; the court being of opinion that Kaiser had a right to explain; whereupon he added, that the deceased owed him rent from the 1st September, 1839, to the day of his death, which was on the 7th of the month.

A person to whom any house rent is due by the deceased is a creditor and will be preferred for the curatorship, to a stranger.

We are of opinion the court did not err. It was otherwise proved that some rent was due.

The party failing in his application for curatorship of an estate, through the opposition of another or otherwise, must pay the expenses of the contestation.

It is urged that the applicant, Hoffman, was improperly mulcted in the costs of the opposition. The Louisiana Code, article 1118, provides, that "in contestations relating to the curatorship of successions, the parties who have failed in their demands or oppositions, support the expense of them." The applicant failed in his demand, and the opposition of Kaiser was the consequence of it, and the former was correctly charged with the costs of the contestation.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates for the parish of Jefferson be affirmed with costs.

PORTER vs. HIS CREDITORS.

EASTERN Dis.
May, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

PORTER
vs.
HIS CREDITORS.

Under the act of 1808, although the insolvent failed to deposit his books in the clerk's office at the time of his application, yet he may be permitted to do so as soon thereafter as they were *called for*; even after opposition filed.

Where the opponent alleges *he believes* the insolvent has omitted to put all his property in his schedule, it will not be considered a charge of fraud.

Where the loss of part of the insolvent's books is shown by his affidavit, and an *ex parte* affidavit, hearsay, and other evidence received without objection, it will suffice.

When there are no creditors *in court*, opposing the discharge of a debtor, under the act of 1808, there is no obstacle to his discharge.

When the opposition does not contain an actual charge of fraud, a Jury need not be empannelled to try it.

The plaintiff filed his petition and schedule, and prayed for the benefit of the insolvent law of 1808, for the relief of debtors in actual custody.

Nathan Nicholls, one of the creditors, made opposition to the insolvent's discharge on several grounds, and alleged, that he believed the debtor had omitted to put down on his schedule all the claims and property belonging to him, &c., and had not deposited his books in the clerk's office, as he was bound to do. He prayed, that the insolvent be denied the benefit of the insolvent law he was seeking.

On the day of trial, the books and documents were brought into court, and deposited with the clerk. The insolvent's affidavit at the foot of a supplemental petition, together with the affidavit letters, and other papers were produced, to show the loss of a portion of his books, kept by him up to August, 1838. A bill of exception was taken to the production of the remaining books on the day of trial, as being too late.

There was judgment by the court, discharging the insolvent, and the opposing creditor appealed.

——— for the plaintiff and appellee.

Collens, for the opposing creditor, assigned errors.

EASTERN DIS.
May, 1841.

PORTER
VS.
HIS CREDITORS.

18	400
121	790

Martin, J. delivered the opinion of the court.

Nathan Nicholls, an opposing creditor, is appellant from a judgment, which discharges the insolvent from all suits and actions, pending against him, and from all manner of debts, which he may have contracted.

The appellant assigns the following errors:

1. The insolvent did not deposit his books in the clerk's office, as is required by law, when he filed his petition and schedule, but after the return day of the notice to his creditors.

2. Further time was granted to the insolvent, to produce his books, and he was allowed to produce them after the opposition was filed, opposing his discharge.

3. He was allowed to prove the loss of his books, kept by him previous to August, 1838, and to rebut the charge of fraud by *ex parte* affidavits, hearsay, and other illegal evidence, without allowing the opponent to cross-examine or to make objection.

4. The insolvent was illegally discharged on this *ex parte* evidence, and without two-thirds of the creditors present in court, consenting thereto; and when in fact the only creditor present, opposed it.

5. No commissioners were appointed, as is required by law, when two-thirds of the creditors present are dissatisfied with the immediate release of the debtor.

6. No Jury was called to try the question of fraud, which was suggested by the opposition.

Under the act of 1808, although the insolvent failed to deposit his books in the clerk's office at the time of his application, yet he may be permitted to do so as soon thereafter, as they were called for; even after opposition filed.

I. The act of March 25, 1808, under which the insolvent sought relief, requires, that all his books and accounts shall be deposited in the clerk's office, at the time of his application.

We nevertheless think, that the court did not err in permitting the appellee to deposit such books and accounts, as he was in possession of, as soon as they were thereafter called for.

II. The necessary time was properly given the insolvent, to produce his books and accounts, notwithstanding the opposition had been filed.

III. There is no charge of fraud alleged in the opposition; the opponent only says, he believes, that the insolvent has omitted to put all his property in the schedule.

EASTERN DIS.
May, 1841.

The loss of the books and accounts, previous to August, 1838, was proved by the affidavit of the insolvent, at the foot of his petition,; and by the ex-parte affidavit, hearsay and other evidence, by which a further attempt, to prove the loss, was made, were received without any objection from the appellant.

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vs.
HIS CREDITORS.

Where the opponent alleges, *he believes* the insolvent has omitted to put all his property in his schedule, it will not be considered a charge of fraud.

IV. It does not appear, that any creditor came and opposed the discharge of the insolvent. The record indeed shows, that the appellant's counsel resisted the productions of the books and accounts, kept since the 20th October, 1838, and took his bill of exception to the opinion of the court, permitting the insolvent to deposit them on that day; declining a continuance, which was offered him, to inspect and examine them. This is the last opposition, that appears to have been made in his behalf. The judgment of the court informs us, that no further opposition being made, the insolvent was discharged.

Where the loss of part of the insolvent's books is shown by his affidavit, and an ex-parte affidavit, hearsay and other evidence received without objection, it will suffice.

V. It does not appear, that any creditor was present to oppose the immediate discharge of the insolvent. The opposing creditors, spoken of in the 6th section of the act of 1808, 1 Moreau's Dig. 569, are not those, who have filed an opposition, but the creditors who are present in court at the time when the immediate discharge is moved for, and express their dissatisfaction therewith. It does not appear, that any creditor was there, and did so; and the judgment states there was none.

When there are no creditors *in court*, opposing the discharge of a debtor, under the act of 1808, there is no obstacle to his discharge.

VI. There being no allegation of fraud in the opposition, there was consequently no necessity of empannelling a jury to try it.

When the opposition does not contain an actual charge of fraud, a Jury need not be empannelled to try it.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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May, 1841.

VAIRIN & CO. vs. HUNT ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

VAIRIN & CO.

vs.

HUNT ET AL.

There is no difference between dwelling houses and stores in relation to the rights of the lessor, on the effects of the lessee, and under lessee; and persons who pay storage on their goods in a warehouse are liable to the landlord's privilege as sub-lessees.

But the goods or effects of sub-lessees or persons storing property in a warehouse under lease, are subject to the proprietors' right of pledge or privilege only for such sum as they may be owing at the time this right is enforced.

This is an action to recover the sum of \$504, the value of 237 sacks of corn, which it is alleged the defendants caused to be provisionally seized under the landlords' privilege for arrears of rent, amounting to \$200, due them by their lessees, Mills & Settle, for a warehouse in Commerce street, in which the plaintiffs' corn was stored.

The plaintiffs further allege that they warned the defendants as soon as they had notice of the seizure, not to sell the corn as it was theirs; offering at the same time to pay the amount due for its storage; but that they persisted, and obtained an order *ex-parte* and sold the corn. The plaintiffs pray judgment for its value.

The defendants pleaded a general denial. On these pleadings and issues the cause was tried.

It was admitted the corn in question was stored with Mills & Settle, the lessees of the defendants, in their warehouse on lease from the latter; that there was \$200 rent due from the lessees to defendants, for which the plaintiffs' corn was seized and sold. It was admitted the amount due for storage of the corn was tendered to the defendants before the sale of it, and declined by them.

There was judgment for the plaintiffs in the amount claimed and the defendants appealed.

C. M. Jones, for the plaintiff, relied on La. Code, art. 2678, that goods sent to an auctioneer for sale, are not liable for the landlords' privilege, because only transiently in store to be sold.

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1124 621

The same principle applies to the storage of merchandise with a lessee; especially when the landlord knew of the ownership of the goods he has no privilege; so says Delvincourt; see also 8 La. Reports, 509.

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Chinn & Anderson for defendants and appellants, justified the seizure under articles 2675 and 2677 of the La. Code, which declare that the lessor has a right of pledge on property and effects of *the lessee*, found in the premises; and that the same provision extends to the property of *third persons* when their goods are contained in the house or store by their consent either express or implied.

Morphy, J. delivered the opinion of the court.

Plaintiffs seek to recover \$504 as the value of a quantity of corn they had stored for safe keeping in a ware-house kept by Mills and Settle. This ware-house, the property of defendants, had been leased to the said Mills and Settle; the latter being indebted to defendants to the amount of \$200 for rent, were sued and the corn belonging to plaintiffs seized under an order or provisional seizure. Upon being informed of this, plaintiffs immediately apprized defendants that the corn was their property, offered to pay the amount of storage due on it and notified them that they would be held responsible for the value of the corn, if not returned. Notwithstanding this notice and offer, on the part of plaintiffs, the corn was sold to pay the rent. The question is whether under these circumstances the goods of plaintiffs were pledged by operation of law to secure the judgment of the rent to the proprietors of the store, and if so, to what extent? It is contended that the corn seized was subject to defendants' right of pledge for the whole amount of rent due to them under article 2677 of the La. Code, which declares that "this right of pledge affects not only the moveables of the lessee and under lessee, but also those belonging to third persons when their goods are contained in the house or store by their own consent express or implied." It seems to be taken for

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There is no difference between dwelling houses and stores in relation to the rights of the lessor on the effects of the lessee, and under lessee; and persons who pay storage on their goods in a warehouse are liable to the landlords' privilege as sub-lessees.

granted that plaintiffs are third persons and not under lessees; we can see no good reason why they should be so considered. The preceding article 2675 gives to the lessor, for the payment of his rent, a right of pledge on the moveable effects of the lessee which are found on the premises leased. It declares that this right in cases of houses and other edifices includes the furniture of the lessee and the merchandize in the house or apartment, if it be a store or a shop. The next article provides that this right extends to the effects of sub-lessees so far as they may be indebted to the principal lessee, at the time when the proprietor chooses to exercise his right. From these articles of our Code, it is apparent that no difference was intended to be made between dwelling houses and stores, in relation to the rights of the proprietor on the effects of the lessee and under lessee. We cannot consider persons who pay storage for the safe keeping of their goods in a ware-house in any other light than that of ordinary sub-lessees. The only difference between the latter and the former consists in the mode of payment of their rent; the one pays so much per month or per year for the whole or the part of the building, while the other pays in proportion to the quantity of goods stored and the time they remain in the ware-house. It is well known that the most ordinary use made of large stores and ware-houses, by those who rent them, is to receive goods on storage. It has become, in this city, a particular line of business; the commission merchant, receiving the produce of the western country, but seldom rents a store directly from the proprietor; the latter generally rents by the year, while the commission merchant wants a place of safe keeping only temporarily until he can sell the goods consigned to him. Thus the lessee of a ware-house generally underlets for short and indefinite periods to a number of persons such portions of the premises, leased to him, as may be wanted for the storage of goods and merchandize. It is very unusual for the principal lessee of a ware-house to underlease in any other way, nor would he find it profitable to do otherwise; but whether the underlease is made of a certain

part of a ware-house, or whether it is made by receiving goods on storage, it appears to us that the persons who pay rent or storage to the principal lessee, are his sub-lessees within the meaning of article 2676; and that their effects are to be subjected to the proprietor's right of pledge only for such sum as they may be owing at the time this right is enforced.

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& MATHER
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In a city like ours, through which vast quantities of produce and goods are continually passing either to be sold for exportation or to be carried into the interior of the country, it would be detrimental to the interests of trade; if a different rule was to prevail, provisional seizures for large arrears of rent would be constantly obstructing the free and extensive transaction of business, and would, in some cases, lead to extreme hardship and injustice; it is from considerations of this kind, we understand, that elsewhere goods stored in ware-houses, in the course of trade, have been considered as placed there temporarily and have been entirely exempted from distress for rent; 3 Kent's Com., p. 477.

But the goods or effects of sub-lessees or persons storing property in a ware-house under lease, are subject to the proprietors' right of pledge or privilege only for such sum as they may be owing at the time this right is enforced.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

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CLAIBORNE & MATHER vs. THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

It is the general and settled jurisprudence, that on the dissolution of a partnership all debts due must be first paid, before there is a division among the partners; the fund remains a common stock, and pledged for the payment of the debts of the firm.

The partnership in a Steamboat is dissolved by the destruction of the boat, which was the object of the contract of partnership; and the insurance money, arising from the loss of the boat becomes a fund out of which all the creditors of the partnership must be first paid.

Creditors have a right of preference or privilege on the partnership fund, to be first paid; and no partner can assign his share, until the debts of the firm are paid.

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CREDITORS.**

So where two partners make a surrender of the partnership affairs with their own, the third partner, who is solvent, cannot take out his share of the partnership fund, until the partnership debts are first paid.

This is the second time, which the present case has been before this court. *See 13 La. Rep. 279.*

Claiborne and Mather were three-fourths owners of the steamboat Marmora, which was destroyed by fire, and J. Leplicher the owner of the other fourth. The boat was insured for \$40,000. Claiborne and Mather made a surrender of their property to their creditors; alleging, that all their property or effects consisted in the insurance on the steamboat, and about \$1000 due to her, and that by losses and misfortunes their debts exceeded that amount. A syndic was appointed by the creditors of the insolvents, who were also creditors of the boat. Leplicher, and his assignees, Bernard & Julien, to whom he had assigned part of his share in the insurance, opposed the proceedings of the syndic, and alleged they were entitled to receive Leplicher's share; he not having made any surrender. The District Judge sustained the opposition so far as the assignees Bernard & Julien were concerned, for the amount assigned to them by Leplicher; but ordered the Insurance Offices to pay over the balance coming to Leplicher, as well as that due to the insolvents, to the Syndic, and that the costs be paid out of the mass. The Insurance Companies appealed. Leplicher also prayed an amendment of the Judgment, and that he be entitled to receive the balance of his share, after paying his assignees.

Eustis, for the appellees, contended.

1. That the Syndic has no power to administer or take under his control any property other than that belonging to the insolvents, represented by him; and

2. Consequently has no right over the property belonging to the appellees; and

3. Could recover from the Insurance Companies only three-fourths of the interest covered by policies, and represented by him.

Maybin & H. B. Conrad, for the Insurance Companies **EASTERN DIS.**
and appellants. **May, 1841.**

**CLAIBORNE
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CREDITORS.**

1. They have paid to the Syndic of the creditors of Claiborne and Mather the balance of the proceeds of the policies of insurance effected by them, which payment was made under a decree of the inferior court, rendered May 15, 1839. The payment is shown by the tableau and judgment of the inferior court, page 34, and is not denied. The appellants are therefore protected by a judgment of the inferior court, unappealed from.

2. The point decided against the appellants by the second judgment of the inferior court, has been decided by this court in this same case, and reported 13 La. Rep. 279. The question was whether the opposing creditors, Leon Bernard and others could withdraw the proceeds of the share of Leplicher, before the partnership creditors were all paid.

3. If not decided in this case, the law is settled, that Leplicher and his assignees are entitled to no part of the partnership property, till all the partnership creditors of Claiborne, Mather and Leplicher be fully paid. Leplicher could not make an assignment, because the property was not his; it was partnership property, and it as much belonged to his co-partners, as to him. 10 Martin, 640; 11 Martin, 427; 5 Martin, N. S. 626, 568. On this principle it has been held by this court, that one partner or joint owner cannot sue his partners for a certain portion of the common property; but must sue for a partition and settlement; 3 La. Rep. 136; 13 Idem 435; and the partnership creditors have a privilege on the partnership funds for the payment of their debts. La. Code, 2794; 8 Martin, N. S. 606.

The partnership having been dissolved by the extinction of the thing, Code 2847, one partner, as Leplicher, had less the right to transfer any portion of the partnership funds. 5 Idem, 324; La. Code, 2841-2.

4. The appellants were condemned without having been notified or heard. After the remanding back of the cause no proceedings were notified to them.

Preston, syndic in *propria persona*.

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Simon, J. delivered the opinion of the court.

This case was once before us: In conformity with the decision of this court, reported in 13 *La. Rep.* 280, the claims of Leplicher, Leon Bernard and Julien, as set forth in their opposition, were to be settled and determined according to the legal principles therein established. One of those principles was, that the funds under the control of the inferior court, proceeding from the policies of insurance of the steam boat *Marmora*, being partnership funds, *must be first applied to the payment* of the partnership debts, in preference to those of the individual debtor; and that as by the tableaux of distribution, the funds in hand would pay no more than sixty-five per cent. of the said partnership debts, no part of them could go into the hands of Leplicher, until those debts are paid.

But the lower court, in the judgment appealed from and now under consideration, decreed that Bernard and Julien should recover of the two insurance companies, as set forth in the said judgment, the whole amount transferred and assigned to them by Leplicher, to wit: \$3364 16; and that the balance (including the residue of Leplicher's portion) of the proceeds of the policies of insurance, as adjusted, after deducting the claims of Bernard and Julien, should be paid over by the said insurance companies respectively to the syndic of the creditors of Claiborne & Mather; to be distributed, according to the tableau, among the creditors of the partnership, and that Leplicher's opposition be dismissed. From this judgment, the insurance companies and the syndic appealed.

Leplicher prays in his answer that the judgment appealed from be amended, and that judgment be rendered in his favor against the insurance companies for his entire interests in the steamer covered by the policies.

The principal point which this cause would present, has already been passed and decided upon by this court in the opinion reported in 13 *La. Rep.* 279; and there it was clearly established that the claim of *Leplicher and his assignees*, for his

proportion of the fund, *being considered as involving a demand for a partition and settlement of the partnership concerns, was subject to the payment of the partnership debts, which is the first step to be taken*; and that none of the partners could be entitled to any part of the common funds, until all the debts are paid. This is in accordance with the general jurisprudence of this court, in which it has been repeatedly held, that on the dissolution of a partnership, all debts due must be paid before there is a division among the partners, and that the property, acquired by a partnership, does not belong to either of the partners separately, but remains a common stock and pledged for the payment of the debts of the firm; 10 *M. R.* 640; 11 *M. R.* 427; 5 *Martin N. S.* 568 and 626. The partnership in question was dissolved by the extinction of the thing which was the object of the contract; *La.*

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It is the general and settled jurisprudence, that on the dissolution of a partnership all debts due must be first paid, before there is a division among the partners; it remains a common stock, and pledged for the payment of the debts of the firm.

Code, art. 2847; and Leplicher had no more right, after the dissolution, to transfer any part of his share or any portion of the partnership fund, to the prejudice of his co-partners or of the creditors of the firm, than one of the heirs of a succession would have before the payment of the debts; 5 *Martin N. S.* 324. The creditors must be paid first, and they have, by law, a right of preference or privilege on the partnership estate for that purpose; *Idem art. 2794*; 8 *Martin N. S.* 606.

The partnership in a Steam-boat is dissolved by the destruction of the boat, which was the object of the contract of partnership; and the insurance money, arising from the loss of the boat, becomes a fund out of which all the creditors of the partnership must be first paid.

We therefore conclude that the district judge erred in changing the destination of a part of the partnership fund, and in ordering the sum of \$3364 16 to be paid to Bernard and Julien by the two insurance companies, to the prejudice of the creditors of the firm; this sum, together with the balance coming to Leplicher, must be first applied to the payment of the partnership debts.

Creditors have a right of preference or privilege on the partnership estate, to be first paid; and no partner can assign his share, until the debts of the firm are paid.

But it is urged that the syndic of the creditors of Claiborne & Mather has no right to receive the portion of Leplicher and his assignees; and that as Leplicher has not failed, he is entitled to liquidate his own affairs, to receive his dues, and to pay his own debts: this would be correct, if this case did not present a *concurso* of the creditors of the partnership, who are

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So where two partners make a surrender of the partnership affairs with their own, the third partner, who is solvent, cannot take out his share of the partnership fund until the partnership debts are first paid.

here represented by their duly appointed syndic. The insolvents, being bound *in solido* with Leplicher, have placed the creditors of the firm on their bilan for the whole amount of their claims, and as all the suits relative to the insolvents' surrender, to the claim set up by Leplicher and his assignees, and to the settlement of the partnership concerns, were consolidated; we may thus fairly consider the creditors of the firm as litigating their rights, through their syndic, with Leplicher and his assignees, and as making opposition to the latter's recovering any part of the proceeds of the policies, until the debts are satisfied; indeed, to bring this matter to a final adjustment, this is, in our opinion, the only course to be pursued. Leplicher and his assignees cannot be allowed to draw any thing from the partnership fund, before the debts are paid, and we see no reason why the syndic of the *concurso* should not be permitted to the liquidation of the concerns, and to appropriate the funds under the tableau to the payment of the partnership debts. It is admitted that the amount of the claims against the firm, as established by proof, is much larger than the fund which is now under the control of the court for distribution; and if so, Leplicher and his assignees, having, as that court said in its first opinion, *become parties to the insolvent proceedings*, it appears to us proper that the final settlement and liquidation should also be made by the syndic of the creditors under the control of the inferior court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, and this court proceeding to give such judgment, as, in our opinion, ought to have been rendered in the lower court, it is ordered, adjudged and decreed, that the proceeds of the policies of insurance of the steamer Marmora, be paid over by the Louisiana State and the Western Insurance Companies respectively to the syndic of the creditors of Claiborne & Mather, to be distributed among the creditors of the steamer Marmora under the control of the inferior court by a tableau of distribution, filed for that purpose; the appellees paying the costs of this appeal.

OF THE STATE OF LOUISIANA.

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SMITH vs. DICKINSON'S EXECUTOR.

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May, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW ORLEANS.

SMITH
vs.
DICKINSON'S
EXECUTOR.

An account for boarding and expenses of the last sickness, which depends on inspection and proof, the judgment of the court *a quâ*, in which the witnesses appeared and testified, will have great weight.

This is a suit instituted by the plaintiff, keeper of a boarding house, to recover the sum of \$527 25, being the amount of her account for boarding and expenses, trouble, &c., for attendance on the deceased in his last sickness. She annexed a detailed account to the petition.

On inspection of the account, and allowing a credit of \$112, already paid; and also examining witnesses, the Judge of Probates reduced the account to \$170; and from judgment for this sum she appealed.

Rawle, for the plaintiff and appellant.

Eyma, contra.

Martin, J. delivered the opinion of the court.

The plaintiff seeks to recover the sum of \$527 25 on account, for the board, attendance and supplies to the testator, who was a boarder and died in her house, about three months after he came to board; as well as for articles of bedding, which were damaged by his sickness, and she was compelled to burn.

The Court of Probates reduced the plaintiff's demand to one hundred and seventy dollars, the sum of \$112 having been already paid; and she appealed.

In a case like this, the opinion of the inferior judge, who is supposed to know, and who hears the witnesses, has much weight with us. A close attention to the testimony has resulted in the conclusion, that in the present case, our interference with the judgment of the Court of Probates is not required.

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

An account for boarding and expenses of the last sickness, which depends on inspection and proof, the judgment of the court *a quâ*, in which the witnesses appeared and testified, will have great weight.

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STANTON vs. COX'S SYNDIC.

STANTON
vs.
COX'S SYNDIC.

APPEAL FROM THE PROBATE COURT FOR THE CITY AND PARISH OF
NEW ORLEANS.

Where a creditor takes the goods of his supposed debtor in his absence, and sells them at a sacrifice, he is chargeable with them, at the price they were limited at by the consignor.

The Syndic filed his provisional tableau, on which he placed the plaintiff in opposition, J. W. Stanton, as a creditor, in the following manner: "for \$3361 48, and damages \$1500, together \$4861 48." "By the books of the estate, there appears to be due but \$2057 24; and that amount the syndic claims the right of placing to the credit of J. F. Smith & Co., who are largely indebted to the estate."

Stanton made opposition to the tableau, and claimed to be placed as a creditor absolutely for the sum of \$4500, being the amount of goods consigned to him, and illegally sold by Cox, and as damages for his illegal and violent conduct in seizing and selling his goods.

The Judge of Probates was satisfied from the testimony, that Cox had, illegally in his absence, taken a quantity of wines, on consignment to him, and caused them to be sold at auction, to pay a supposed endorsement debt due by Stanton, when in fact the first set of exchange had been paid to the Bank.

There was judgment, allowing the opposing creditor the price of the goods, taken at the limits fixed by the consignor, and he was put down for \$2118 50. He appealed from this judgment.

Bradford, for the appellant.

Th. & J. Slidell, for defendant.

Bullard, J. delivered the opinion of the court.

The Syndic of the estate of Cox placed on the tableau of distribution a claim of J. W. Stanton, the present appellant, which, with others, was referred by him to the court, in the fol-

lowing words: "J. W. Stanton \$3361, and damages \$1500, together \$4861;—by the books of the estate, there appears to be due but \$2057 25; and that amount the syndic claims a right to place to the credit of J. F. Smith & Co., who are largely indebted to the estate."

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To the claim as thus represented, Stanton made opposition, and insisted on his right to be placed absolutely on the tableau for \$4500, for goods of his, illegally taken and sold by Cox.

The record shows, that goods held by Stanton for sale under consignment, were taken by Cox, and sold at auction, to pay a debt, supposed at that time to be due by Stanton, who was absent. The goods had been confided by Stanton to Smith & Co., who consented to Cox's proceedings. They were sold at a sacrifice; and the Court of Probates considered, that the opposing creditor was entitled to a fair indemnity, and by its judgment charged the estate with the goods at the price, at which they were limited by the consignors of Stanton. This we consider a fair and just standard of indemnity, especially as the pretext for the irregular proceeding arose out of an endorsement of Cox for Stanton of a Bill of Exchange, which the former had taken up after protest; although in point of fact the first set of exchange had been paid without the knowledge of the endorser, and of the Commercial Bank, the holder of the second under protest. The fault was attributed to the Bank, whose Cashier promised on its part to make up any loss or damage arising from the sale of the goods.

Where a creditor takes the goods of his supposed debtor in his absence, and sells them at a sacrifice, he is chargeable with them, at the price they were limited at by the consignor.

The judgment under this view of the case would not be disturbed by us, if it had not been for the omission, inadvertently, of an item of \$545 88, which was not contested, and which must be added to the sum allowed.

It is therefore ordered and decreed, that the judgment of the Court of Probates, so far as it relates to the claim of J. W. Stanton, be reversed, and that the tableau be so amended, as to allow to said Stanton the sum of \$2718 21, and that thus amended the tableau be homologated and approved, and that the costs of the appeal be paid by the appellee.

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May, 1841.

**NEW-ORLEANS
 AND NASHVILLE
 RAIL ROAD CO.
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 GANALH & CO.**

**NEW ORLEANS AND NASHVILLE RAIL ROAD
 COMPANY vs. GANALH & CO.**

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY
 OF NEW ORLEANS.**

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When a party declines a compliance with his part of the contract, the institution of suit, claiming the performance of the contract, or damages in the alternatives is a sufficient putting of the defendant *in mora*, if any was necessary.

It would even be an idle ceremony for one party to do certain acts on his part, before suing for a breach of the contract, after the other declines complying with it on his part.

Where the defendants refused a compliance with their contract, for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for the damages.

This is an action to enforce the performance, or recover damages for the non-performance of a contract made with the defendants for the importation and delivery of 50 miles of Rail Road Iron.

The plaintiffs allege that in 1835 they contracted with the defendants, by written agreement, for the purchase and shipment of 50 miles of Rails, from England, by the first of February, 1836; to be purchased and shipped under the direction of the chief engineer of the road, who went out in October, for that purpose. That the Iron was to be furnished at the lowest selling price at the time; the plaintiffs paying the first cost and all charges, with 5 per ct. commission on the amount. The plaintiffs further show that the defendants wholly failed and refused to comply with their contract, to their great damage, having afterwards to pay much higher than the selling price at the time said contract should have been executed; and were greatly disappointed and delayed in their works in consequence of its non-performance. They pray that the defendants be required to perform their contract, or pay them \$60,000, for damages for the failure to perform.

The defendants pleaded the general issue. They admit their signatures to the contract, but aver that by the interfer-

ence of the chief engineer in England with their agents, the contract was retarded and finally prevented from being carried into effect; that they were likewise prevented from complying with their contract by the officious and inefficient conduct of the plaintiffs, &c.

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May, 1841.

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AND NASHVILLE
RAIL ROAD CO.
VS.
CANAL & CO.

These pleadings formed the principal issue between the parties, and on which they went to trial before the court and a jury.

Upon the evidence taken and submitted to the jury, they returned a verdict for the plaintiffs and assessed their damages at \$7500; and from judgment confirming this verdict the defendants appealed.

Hoffman,, for the plaintiffs.

L. C. Duncan, for the defendants.

Bullard, J. delivered the opinion of the court.

The plaintiffs allege that they entered into a written contract with the defendants, by which the latter engaged to import from England as soon as possible after the first of February, 1836, fifty miles of Rail Road Iron to be made according to the order of the chief Engineer, and to be approved by him. That the defendants were to pay all costs and charges and import the Iron at their risque, and that the plaintiffs on their part engaged in consideration of the promises, to pay the current price at the place of exportation at the time of the shipment, together with the costs and charges and five per cent. commissions upon the total amount of said costs and charges. The plaintiffs further allege that relying on the faith of said agreement they sent their Engineer to England, in October, 1835, where he remained until the next spring. That the defendants referred them to their correspondents in Liverpool and London to carry the contract into effect with every assurance that it would be complied with. They allege that they made early and repeated application to said correspondents to carry the contract into effect, but that various objections were made of

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which the defendants were advised. The petitioners finally aver that they have performed or have been always ready and willing to perform all they were bound to do by said contract, but that the same has been violated by the defendants to their great damage. They therefore pray that the defendants may be decreed to perform their contract by the delivery of four thousand tons on the payment by them at the price it was worth at the period the defendants were bound to deliver it, together with ten thousand dollars for the delay, or that they be condemned to pay damages which they estimate at sixty thousand dollars, and costs.

The defendants admit the contract, but deny their liability, because they say the plaintiffs both directly and by their agent Ranney, their chief engineer, so interfered in England with the defendants' agents as at first to retard and ultimately to prevent the due execution of the contract. The respondents further deny their unwillingness to comply with their contract, but they aver their readiness to carry the same into effect within a reasonable time, but were prevented by the capricious and inefficient conduct of the plaintiffs and their agents, who never complied with the obligations assumed by them in said contract, but on the contrary neglected and refused to comply with the same. They further aver that the plaintiffs, by their agents and by their engineer in England, undertook to make, and did actually make, contracts for the delivery, at New Orleans of a large quantity of rail-road iron on less favorable terms than would have been made by the respondents' agents. They conclude by praying judgment in their favor.

The case, upon these issues, was submitted to a jury whose verdict for the plaintiffs being followed by a judgment, the defendants prosecute this appeal.

Besides the grounds of defence set forth in the answer, it has been urged in argument, that the defendants were never put legally in default, and without evidence of such putting in default damages cannot be recovered. This objection does not appear to us, from the evidence, to be insurmountable.

In the first place it may be remarked that this suit, in which the plaintiffs claim the performance of the principal obligation or damages in the alternative is a sufficient putting of the defendants *in morâ*, if indeed any such step was at all necessary after the defendants had declined furnishing the iron without a material modification of the contract. They did not wait for a formal demand, and the furnishing of a model by the agent of the company but at once declined, through their agents in England, complying with their contract. After this, it would have been an idle ceremony to have given a formal description of the rails as required by the engineer of the company. The evidence in the record shows that such was the case. The only correspondents of the defendants in England, upon whom they relied to fulfil their contract, positively refused to have any thing to do with it unless the money was placed in their hands in the first instance. Such a change of the contract appears to have been solicited in vain from the company. During the discussion upon that subject nothing was said of the company having failed to comply with any of the preliminary conditions imposed upon them by the contract.

But the defendants defend themselves on the ground that they were prevented from performing their part of the contract by the capricious and inefficient conduct of the plaintiffs' agent and engineer. The evidence on this subject is that the price of rail road iron rose very considerably while Mr. Ranney, the engineer, was in England. How far his representations of the extensive demand for the article to carry on the works contemplated by the plaintiffs, or other corporations, may have influenced the price is not so clearly shown; nor does it appear how an increase of price could have affected the defendants, who, according to the contract, as ultimately agreed on, were to be refunded the price they might have to pay, provided it was the current price at the time of purchase, together with charges and a commission of five per cent. upon both. One of the house of Coleman, Lambeth & Co. who was examined as a witness, testifies that "he immediately pointed out to him

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GANALE & CO.

When a party declines a compliance with his part of the contract, the institution of suit, claiming the performance of the contract, or damages in the alternative is a sufficient putting of the defendant *in morâ*; if any was necessary.

It would even be an idle ceremony for one party to do certain acts on his part, before suing for a breach of the contract, after the other declines complying with it on his part.

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(Ranney,) that the contract could not be executed in consequence of the 4th article, as no iron master would agree to manufacture rails according to a particular pattern subject to the fixing the price at a future period. The agreement was afterwards modified in that particular, but, still nothing appears to have been done in conformity therewith. The arrangements made or attempted to be made by Ranney, in Wales, under a letter of credit from Coleman, Lambeth & Co. were a deviation from the contract made with the defendants, and that house cautiously avoided adopting the agreement made by the defendants.

Where the defendants refused a compliance with their contract, for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for the damages.

Upon the whole, we cannot see in the conduct of the plaintiffs' agent or engineer, any legal defence to this action. It appears to us clear, that the defendants' correspondents in England declined executing the contract, for reasons wholly unconnected with his proceedings, and the evidence shows that the amount of damages awarded by the jury was justified by the facts of the case.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

HODGE vs. CLEARY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF

NEW ORLEANS.

The statute of 18th March, 1828, providing the mode of selling town lots in New Orleans, for the payment of City taxes, applies to *non-residents only*. The sale of the property of a *resident* is a nullity.

This is an action to recover back two lots of ground, in the city of New Orleans, which had been seized and sold, without the knowledge of plaintiff, for city taxes due the Second Municipality for paving the side walks.

The defendant claimed title under the Marshal's sale for taxes, purporting to be made under the act of 1828.

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The law invoked says, "whenever any sum of money shall be due to the corporation of the City of New Orleans, by *non-residents* who have no agent in the city, for city taxes, &c.," the corporation after certain formalities, "may cause city lots, &c. to be seized and sold, &c."

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The plaintiff showed he was and had been for a great many years, a resident of the city; and was never absent except for about 3 months to the north in the summer of 1838, and then he left two fully authorised agents in the city.

There was judgment for the plaintiff, and the defendant appealed.

L. Pierce, for the defendant,

Micou, contra.

Morphy, J. delivered the opinion of the court.

The plaintiff claims, as his property, two lots of ground forming the corner of Estelle and Magazine streets, alleging that he has never parted with his title to the same, nor been legally divested of it. The answer avers that defendant has become the lawful owner of these lots by virtue of a sale made to him by the City Marshal, to satisfy a judgment of the City Court, by which they were decreed to be sold for taxes due to the Second Municipality.

The record shows that the plaintiff was the lawful owner of the property in dispute by purchase from his brother William Hodge; that in the year 1838, a sum of \$106 43 being due to the Second Municipality for the paving of the side-walks of the property, proceedings were instituted under the act of the Legislature, approved the 18th March, 1828, which resulted in the forced alienation complained of by the claimant. The only inquiry before us, then, is whether these proceedings were authorized by law, and carried on in conformity with

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this statute. Its object was to provide for and regulate the collection of taxes and other sums due to the corporation by *non-residents who have no agents in the city*. It is against persons of this description alone that the particular mode of pursuit, sanctioned by this act, can take place; and we have heretofore required a most rigid compliance with its provisions. It is in proof that plaintiff is an old resident of this city and was well known to the authorities of the Second Municipality as the owner of the property in question; that he had paid taxes on it from the time he had acquired it. That in the summer of 1838 he left the state and was absent about three months on a trip to the north, but that during that time he had in the city two well known agents whom he had appointed by authentic act, and that on his return he paid his last city tax on this very property but a few weeks before it was sold from under him as belonging to some unknown non-resident person. From these facts, and the express terms of the act, it is clear that these proceedings were altogether unauthorized by law; they can be considered but as the result of error and gross inattention on the part of the officers of the Municipality, and could not have the effect of divesting plaintiff of his property. Under this view of the subject, it is unnecessary to consider if there has been any omission of the formalities required to have effected a valid alienation of the lots in dispute; Acts of 1828, p. 102; 4 La. Rep. 148; 13 Idem 208.

The judgment of the Parish Court is therefore affirmed with costs.

STARR & HOWLAND vs. ZACHARIE & Co.

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May, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**STARR
& HOWLAND
vs.
ZACHARIE & CO.**

Where agents sold property on short time for notes, which were not paid in full, but an extension of time given, on renewal, with small payments and interest included, all of which was communicated to the principals, who made no objection, until more than 7 months afterwards: Held, that the agents were not responsible for the balance due on the transaction.

The principal must disapprove his agents' acts within a reasonable time, otherwise he is bound by the acts of his agents, done in good faith.

This is an action to recover the balance of a lumber account, amounting to \$2874 43, according to a detailed statement annexed to the petition.

The plaintiffs allege, they made three several consignments of planed lumber to defendants for sale, amounting to \$6030, which was duly received and sold by the defendants; that the latter sold on credit, and took notes, which was unauthorized. They further show, that after taking the notes of Dakin & Dakin, for the greater part of the lumber, the defendants, without authority, renewed them from time to time, and now insist on giving them in payment of the balance due. They allege, the defendants have made the debt their own, and have become personally liable for said balance; and they pray for judgment accordingly.

The defendants negatived every allegation in the petition.

Upon these pleadings and issues, the parties went to trial.

The evidence consisted principally of the correspondence between the parties, and is stated, so far as is material to the case, in the opinion of this court.

There were but little doubt about the facts; the question turned on the liability of defendants; whether they had made the debt their own or not?

The Judge of the Commercial Court was of opinion, the defendants were not liable. There was judgment in their favor; and the plaintiffs appealed.

G. B. Duncan, for the plaintiffs, insisted that the defendants

EASTERN Dis. made themselves liable for this debt, and the judgment should
May, 1841. be reversed.

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The defendants are liable for the note of Dakin & Dakin. They took the note in their *own name*, and wrote to the plaintiffs, that they had secured its payment. They have shown no diligence to collect it, nor even an offer to return it. Hosmer vs. Bebee, 2 Martin, N. S. 358; Richardson vs. Weston, 4 Idem, 244; Kinney vs. Crane, 17 La. Rep. 417.

Strawbridge, contra.

Morphy, J. delivered the opinion of the court.

This suit is brought, to recover the balance of the proceeds of a cargo of planed lumber, shipped to defendants, and by them sold, for account of plaintiffs, to Dakin & Dakin, architects of this city, at a credit of four and six months. The petitioners allege, that they never authorized defendants to sell their property on credit or to the said Dakin & Dakin, who at the time of the sale were not in good credit; that by keeping the notes received in payment, defendants constituted themselves their agents in relation to them; that when the notes became due, defendants neglected to have them protested and put in a proper train for collection, but did, without their consent or authority, extend the time of payment, and renewed the obligations of the purchasers from time to time, on their paying a portion of the same; that by pursuing such a course, defendants have made themselves personally liable for the balance due by the said Dakin & Dakin. The answers deny any indebtedness on the part of defendants. Judgment was rendered below in favor of the latter, whereupon the plaintiffs appealed.

From the evidence, which consists principally of a long correspondence between the parties, it appears, that the sale, out of which this controversy has grown, took place about the 20th of February, 1837; and that the particulars of it were immediately communicated to the plaintiffs, who made no complaint as to the length of the credit given, or as to the price ob-

tained. In several of their letters, plaintiffs repeatedly requested, that their notes should be discounted, in order to obtain remittances; being apprized by defendants of the impossibility of cashing these notes, on account of the extraordinary posture of affairs in the spring of 1837, the plaintiffs drew on defendants for one half of the nett proceeds of the sale, and their draft was accepted and paid. Dakin & Dakin being unable to take up their first note in June following, the defendants renewed it under an agreement, that they should pay ten per cent. interest, and ten per cent. of the principal on every sixty days' renewal. This arrangement was made known to plaintiffs, by a letter of defendants of the 27th of June, the receipt of which was acknowledged by a letter of plaintiffs, bearing date the 26th of August ensuing; although in the correspondence which took place after this time, plaintiffs speak often of their necessities and great want of money, and frequently urge defendants to make remittances, they express no disapprobation of the extension of time given to Dakin & Dakin, and intimate no intention of exercising any personal recourse upon defendants. At the time of the maturity of Dakin & Dakin's first note, defendants, being informed, that they had sold one half of their lot of lumber to Boyd & Co., and desirous of obtaining some additional security, they insisted on obtaining, and did obtain for one half of the debt Boyd & Co.'s notes, endorsed by Dakin & Dakin, which amount was ultimately paid. It appears, that the plaintiffs were apprized of this circumstance only in December following; and it is in their answer to this communication, that plaintiffs, on the 6th of February, 1838, for the first time declare, that the extension of credit, given in June preceding, was on defendants' responsibility, and that they would hold them personally liable for the debt. Under these facts, disclosed by the correspondence, we agree in opinion with the Judge below, that defendants should not be made to pay the balance yet due by Dakin & Dakin.

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Where agents sold property on short time for notes, which were not paid in full, but an extension of time given, on renewal, with small payments and interest included, all of which was communicated to the principals, who made no objection, until more than 7 months afterwards: Held, that the agents were not responsible for the balance due on the transaction.

This court have held, that factors may sell on credit, if the sales be made in good faith, and to individuals in good credit;

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The principal must disapprove his agents' acts within a reasonable time, otherwise he is bound by the acts of his agents, done in good faith.

In this case, Dakin & Dakin, whose standing and credit appear to have been good at that time, were architects, and extensively engaged in business; they had been recommended to defendants by Pritchard, plaintiff's friend and former agent, and the terms of credit were not unusually long; but be that as it may, plaintiffs received without objection, and approved the accounts of sales. As to the other ground relied on by plaintiffs, it is true, that if a factor, after the sale of his principal's property, extends the terms of credit, or renews the notes of the buyer, he might be considered as making the debt his own, and the principal, when informed of this departure from the line of his duty, may disavow his act, and hold him personally liable for the debt; but this he must do within a reasonable time, otherwise he will be bound by his agent's acts, done in good faith. "If the principal," says Judge Story, "having received information by a letter from his agent of his acts touching the business of his principal, does not within a reasonable time express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification of them." This presumption, he adds, seems now in favor of commerce to be universally acted upon; Story on Agency, p. 250. If the arrangement, which defendants thought they could take upon themselves to make in June, 1837, did not meet plaintiffs' approbation, it was their duty to repudiate it forthwith, and not to suffer their agents to go on renewing this note, apparently with their consent, and receiving the diminution paid on the renewals. After a silence of eight months, and when Dakin & Dakin ceased even to curtail their note, it was too late to disavow the arrangement made by defendants; who throughout the whole affair appear to have acted with good faith and an anxious desire to promote the interest of their principals. If, by taking the notes of Boyd & Co. and mentioning the circumstance only some time after, they acted improperly, plaintiffs cannot complain of it, for the whole of that portion of the debt has been recovered; nor can they take occasion of it to retract the tacit approbation, they had

already given to the conduct of their agents, in renewing the notes of Dakin & Dakin. 11 La. Rep. 288; 16 Idem, 54. EASTERN DIS.
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Another ground of liability has been relied on in argument, though not set forth in plaintiffs' petition; it is drawn from a passage of a letter of defendants, written on the 18th of February, 1838. They say, "Yours of the 6th inst. is received, and we notice your remarks relative to our having renewed the notes of Messrs. Dakin & Dakin; had we not done so, they would have been protested, and you might have been worse off, as in renewing we collected ten per cent. of the amount; and the writer has made arrangements to secure the balance, by deducting out of the cost of his buildings, which he has just contracted with them to rebuild." It is urged, that this is a positive and unconditional engagement on the part of defendants, to pay the uncollected balance on the sale of the lumber. We cannot view it in this light. The evidence shows, that about that time defendants made a contract with Dakin & Dakin, to build five stores, for the price of \$17,000; they contemplated retaining the amount of the builder's debt to plaintiffs out of the sums they would have to pay for the buildings, and it is the announcement of this expectation, which is now sought to be fixed upon defendants as a positive obligation to pay the amount. It is in proof, that the arrangements, spoken of by defendants, and out of which they expected to secure plaintiffs' debt, failed without their fault. Dakin & Dakin never finished the buildings, and remained indebted unto defendants in a sum exceeding \$3000, exclusive of the amount due to plaintiffs. The latter have not shown, that their reliance on this promise, to secure their debt, induced them to delay asserting their rights against their debtors; they have not made it one of their grounds of action in their petition, and they predicated their demand against defendants on the original act of not protesting the notes, and renewing them from time to time.

The judgment of the Commercial Court is therefore affirmed with costs.

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& HOWLAND
ES.
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CASES IN THE SUPREME COURT

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May, 1841.

BENOIST & BLANCHARD vs. THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

BENOIST
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THEIR
CREDITORS.

Where the drawers of a bill depend for its being honored, on the proceeds of a claim against the drawee, then in litigation, and take a receipt that it shall not be protested in case of dishonor, to save costs, they will not be considered as having funds in the hands of the drawee so as to entitle them to notice.

Labadie, being a creditor of the insolvents for the amount of a bill of exchange, and placed on their bilan as such, opposed the tableau of distribution filed by the syndic, because he is not put down as a creditor for his share of the funds.

On the trial the opponent showed, by the bilan, that he had been placed thereon as a creditor by the insolvents themselves for the sum he claimed:

2. That he was present at two meetings of the creditors and voted without any opposition being made.

3. That the tableau, filed by the syndic, leaves him out of the list of creditors.

The objection made, appears to have been raised by the syndic because the opponent failed to have the bill protested for non-payment and give the drawers (insolvents) due notice. That they were not bound for this debt, because of the want of legal notice of protest of the bill of exchange.

The additional facts of the case are fully stated in the opinion of this court.

There was judgment overruling the opposition, and the opposing creditor appealed.

Bodin, for the opponent and appellant.

Labarre & Derbigny, for the syndic.

Simon, J. delivered the opinion of the court.

On the 17th of November, 1830, the insolvents being indebted to J. Labadie, drew in his favor a bill of exchange, on Messrs. A. B. & W. Davis of Rankin, Yazoo County, Mississippi, in the following words: "New Orleans, 17th Nov.,

1830, at two months from date, of this, my only bill of ex-
change, pay to Mr. J. Labadie or order the sum of eight hun-
dred and five dollars 2c., for value received, which place to
account *as per advice* of this; from (signed) J. Benoist liqui-
dator of the house of Benoist & Blanchard. Messrs. A. B.
& W. Davis, Rankin, Yazoo County." On the same day, a
letter of advice was by them addressed to the said Davis, as
follows: "Messrs. A. B. & W. Davis, Rankin, Yazoo Coun-
ty. New Orl's, Nov. 17th, 1830: Gentlemen, I have pre-
vailed upon you this day in favor of Mr. J. Labadie for \$805 2,
in a bill of exchange on you of this date and payable at two
months from date; *if you pay it*, it will be on account of the
judgment I will certainly obtain against you for the amount
you owe my house, at the first session of the District Court of
the United States at Natchez. Yours (signed) J. Benoist,
liquidator of the house of Benoist & Blanchard." The bill
was neither accepted nor paid by the drawees, nor was any
protest made or any notice given to the drawers of the dishon-
or of said bill.

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CREDITORS.

On the 28th of February, 1831, Benoist & Blanchard sued
their creditors, and filed a schedule of their affairs, in which J.
Labadie is placed as one of their creditors, in these words:
"*Jean Labadie, Nlle.-Orléans; notre mandat à son ordre
sur A. B. & W. Davis, de Rankin, du 17 Novembre, 1830, et
payable à deux mois, \$805 2.*" He appeared and voted at
two different meetings of creditors, and no opposition appears
by the process-verbal of deliberation to have been made either
to his claim or to his vote.

A tableau of distribution having been filed by the syndic,
(admitted to be the only one ever filed) in which the name of
J. Labadie is not mentioned, the latter made opposition to its
homologation, and claimed to be carried thereon as a creditor
of the insolvents for \$805, which is the amount of the said bill
of exchange yet unpaid. This opposition was overruled by
the lower court, and judgment having been rendered finally
homologating the tableau of distribution filed by the syndic, the
opponent appealed.

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In addition to the above facts, the record shows that on receiving the bill of exchange, in question, from Benoist & Blanchard, the opponent gave them the following receipt: "*J'ai reçu de Mr. N. Benoist liquidataire de la maison Benoist & Blanchard la traite sur A. B. & W. Davis de Rankin, Yazoo county, Mississippi, de la somme de huit cent cinq piastres 2 sous en payement de ce qu'ils me devaient; Je dit de ce que me devait la maison de Benoist & Blanchard, et je m'engage dans le cas où la susdite traite ne serait ni acceptée ni payée à son échéance à ne leur faire supporter aucuns des frais qui pourraient avoir été faits, et à ne les considérer mes débiteurs que pour la susdite somme de \$805 2 sous valeur vingt Janvier 1831. N. Orléans, 17 Novembre 1830, (signed) J. Labadie.*"—One of the witnesses, whose testimony comes up without any objection, testifies that the said bill was given in consideration of the sum of about \$800, which the insolvent then owed to the opponent on an account of goods; that the reason why the bill was not protested for non-payment, was a certain agreement between the parties that in case of non-payment by the drawees, no costs should be made, and the said bill should be returned without protest. That at the time the same was returned unprotested, Benoist (Blanchard being absent,) agreed to pay it, as it had been agreed on beforehand, and that the original of the receipt, the purport of which is that Benoist & Blanchard gave a certain draft in payment to Labadie, which, if not paid by the drawees should be returned without costs, is in the hand writing of the witness.—From the testimony of Mr. Derbigny, it appears that he had lately been informed that there was in the hands of a lawyer in Mississippi a sum of fourteen or fifteen hundred dollars belonging to the insolvent estate of Benoist & Blanchard recovered from Davis & Co., on which there were some claims; the witness however does not positively know that in 1830, the house of Davis & Co. had in their hands any fund belonging to the insolvents, but he believes that at the date of the draft they had.

From the facts and circumstances disclosed by the evidence, we are not able to say that the district judge did not err in overruling Labadie's opposition and in not ordering him to be placed on the tableau of distribution as one of the creditors of the insolvents. The transaction under consideration seems to be one of a particular nature; it is clear that at the time Labadie took the bill of exchange in question, the drawers, far from being able to rely upon its being punctually paid, were on the contrary aware, or at least afraid, that it would be dishonored, and they accordingly took a receipt, in which they took care to provide against this contingency by freeing themselves from all costs, and by making the debt their own on the 20th of January, 1831, in case of non-payment of the bill at the time due; their letter of advice to the drawees shows also that the only fund out of which they could expect the satisfaction of the bill, was to proceed from a claim then in litigation, and on which they threaten to obtain judgment at the ensuing session of the United States District Court, at Natchez. This was indeed a poor prospect for the collection of a bill of exchange, and almost equal to the drawees' having no fund in their hands belonging to the drawers. Under such circumstances, even without any subsequent promise to pay the debt, on the part of the drawers, we doubt very much that their discharge or liability should depend upon a compliance with the strict rules which generally govern in cases of ordinary bills of exchange, and we should be inclined to believe that the nature of this transaction takes it out of the general principles.

It has been, however, strenuously insisted that this bill having neither been accepted nor paid, should have been duly protested, and notice given to the drawers in order to fix their liability; but we have already shown that the drawers had every reason to expect that such would be the result, that they could not rely upon its being paid; and consequently on its being returned unprotested, one of them *agreed to pay it*, in compliance with their previous understanding with Labadie, and accordingly, the opponent was *carried on their bilan* for the

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Where the drawers of a bill depend for its being honored, on the proceeds of a claim against the drawee, then in litigation, and take a receipt that it shall not be protested in case of dishonor to save costs, they will not be considered as having funds in the hands of the drawee so as to entitle them to notice.

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amount of the bill, without any objections being made to his claim by any of the other creditors until the syndic thought proper to exclude him from the mass. We feel no hesitation in saying that, had this controversy arisen between the opponent and the insolvents, the latter, under the promise and acknowledgment by them made in consequence of the previous circumstances, which show clearly that their liability was not to depend solely on their being duly notified of the dishonor of the bill, would have been bound to pay its amount. We are therefore of opinion that the tableau must be corrected, so as to include the opponent as one of the insolvents' creditors; and we come the more readily to this conclusion, that, from the testimony of Mr. Derbigny, there is a probability that the very same sum out of which the bill was to be paid, is or will be in the hands of the syndic to be distributed among the creditors.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, that the tableau of distribution, filed by the syndic, be so corrected and amended as to include Jean Labadie as a creditor of the insolvents for the sum of \$805 2, and that this case be remanded for this purpose; the costs of the opposition in the lower court and those in this court to be borne by the mass of creditors.

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HARMAN'S HEIRS vs. O'MORAN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a judgment, execution and sale are produced, it is sufficient to convey the property, unless such error or fraud is pleaded and established, as will set aside sales in ordinary cases.

A sale, where specified boundaries are given, is *per aversionem*, and includes all the ground between the points mentioned, whether the measure be correctly stated or not.

This is a petitory action, in which the plaintiffs claim 12 lots

of ground, comprized in a block or part of a square, fronting on Circus street, and bounded by St. Paul and Hevia streets, which they allege their father, Thomas L. Harman, purchased in 1819 from Edward Livingston, and now in the possession and claimed by the defendants Owen O'Moran, M. Ryan, T. Park, J. Field, and L. Janin.

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The defendants mostly severed in their answers, but all claimed title under a Probate sale of Jean Gravier's estate.

The evidence went to show, that the property in question, though formerly belonging to Gravier, had been sold at Sheriff's sale under a judgment and order of seizure or *fiери facias*, in 1816, and purchased by Livingston, who sold to the plaintiffs' ancestor.

On these pleadings and issues, and the evidence, there was judgment for the plaintiffs; and the defendants appealed.

Lockett & Micou, for the plaintiffs.

L. Janin, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiffs allege, that as heirs of their father they are the owners of a piece of ground, having a front of thirty-seven feet on Circus street, running back to St. Paul street by lines, that gradually close, so that on the latter street there is a front of sixteen feet. They say, the defendants have taken possession of said piece of ground, and set up title to it. The defendants, Ryan, and Park, and Field, in their separate answers admit, they are in possession of portions of the ground claimed, which has been divided into six lots of different dimensions; they set up titles, derived from a Probate sale, made of a portion of the estate of the late Jean Gravier, who, they allege, was the real owner, and in possession at the time of his death; they plead a prescription of ten and twenty years, and call the curator of the estate of Gravier in warranty. O'Moran for answer sets up the same grounds of defence as his co-defendants, and further claims of the plaintiffs two thousand dollars for improve-

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ments, put on the lot in his possession ; and also calls Gravier's curator in warranty. Janin allegés defences similar to Park and Ryan, and Field, and further says, that the Sheriff's sale to Edward Livingston, under whom the plaintiffs claim, is of no force or validity, and if it be, it does not include the ground in controversy ; he also calls the curator in warranty.

The curator of the succession of Gravier pleads a general denial, and further, his intestate held the property up to the time of his death, under an adjudication made to him, by the Spanish authorities, in 1797, of all the estate of Bertrand Gravier. He admits the sales to the defendants, and also says, that the sale from the Sheriff to Livingston does not include or cover the premises ; but if it does, he says, it is null and void, as none of the formalities required by law to render the sale valid, were complied with, nor was said sale accompanied by such proceedings as were necessary to make it translativ of property.

The evidence shows, that on the 30th of September, in the year 1811, Jean Gravier, by public act, mortgaged to Joseph Richet and others, "un lot de terre contenant douze terrains situés dans le faubourg Ste. Marie, ayant cent huit pieds de face à la rue du Cirque sur toute la profondeur, joignant d'un côté à la succession Chesneau, et de l'autre au Sieur Jacob Moquin, sur lequel lot de terre se trouve établie une briqueterie, &c." Upon this mortgage, in October, 1814, the mortgagees commenced an action, that was prosecuted to judgment, of which Gravier was notified ; subsequently an order of seizure and sale was issued, levied on the property in conformity with the judgment ; it was sold under this order to Edward Livingston, on twelve months credit, as appears by the returns of the Sheriff and his deed, in which it is described as "a lot of ground situated in the suburb St. Mary, together with all the brick-yard and other buildings thereon erected ; said lot containing one hundred and eight feet on Circus street, adjoining on the one side the property of the estate of Chesneau, and on the other by the property belonging to Mr. Jacob Moquin."

By an act, dated the 29th of the month of April, in the year 1806, Jean Gravier sells to Jacob Moquin "une portion de terre située au faubourg Ste. Marie, bornée d'un côté par la Veuve Delord, de l'autre par un hangard appartenant au vendeur, qui se nomme hangard à poterie, rue du Cirque, contenant six cent dix huit pieds de face depuis la barrière de la Veuve Delord." By reference to the evidence of Pilie, the City Surveyor, it appears, he has more than once measured the line of this property on Circus street, and he says, it reached to Moquin's fence, adjoining the brick-yard.

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By reference to another sale, from Gravier to John Goodwin, it will appear, he sold him three squares, supposed to contain thirty-six lots, of sixty feet front, by one hundred and twenty deep, on which was situated a brick-yard, and the buildings and fixtures necessary to carry it on. It is also stipulated, that Goodwin was to have the right of taking earth out of Gravier's Canal in Poydras street, to deepen the same; also the privilege of cutting wood on his land; he is also bound to open two streets on these squares at his own expense, and if more than thirty six lots are found to be in the squares, Goodwin is to have them, if he shall pay at the rate of four hundred dollars for each. From an inspection of the plans in the record, it is evident, there were more than thirty-six lots, which was probably discovered, when Goodwin laid off Hevia street, and as it does not appear he ever paid for the extra number of lots, it accounts for a portion of the brick-yard still remaining in Gravier's possession. Goodwin afterwards sold the property to the Heirs of Chesneau.

A number of years after these sales, Mr. Livingston sold to the ancestor of the plaintiffs, and describes the property as "douze lots de terre, situés au faubourg Ste. Marie, compris entre les rues du Cirque, St. Paul, Hevia, et la propriété de Jacob Moquin, ayant cent huit pieds de face sur la première, autant sur la seconde, et sept cent vingt pieds sur chacune des deux autres limites;" and further describes it as the same property purchased at the Sheriff's sale, under the execution

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issued in the suit of Richet & Co. vs. Gravier. Several witnesses prove, that Harman took possession of all the ground between Hevia street and Moquin's fence, and enclosed it, which enclosures were kept up by his agent, sometime after he left the State, who also rented out the property. There is no evidence to show, that Gravier ever possessed or claimed the property after the Sheriff's sale in 1816.

The first question is as to the validity of the Sheriff's sale.

Where a judgment, execution and sale are produced, it is sufficient to convey the property, unless such error or fraud is pleaded and established, as will set aside sales in ordinary cases.

It may now be considered as the settled opinion of this court, that whenever a judgment, execution and sale are produced, it is sufficient to convey the property, unless such error or fraud is pleaded and established, as will set aside sales in ordinary cases. 16 La. Rep. 433; Ibid. 547; and the authorities cited in those cases. In this case we have a petition, asking an order of seizure and sale, a regular affidavit, the act of mortgage attached, the order of the Judge, and notice to defendant; then follows an answer or opposition, and another order of the Judge; after which there appears to have been a trial and judgment regularly rendered, in consequence of which the order of seizure and sale was continued; a sale took place, and a deed was made by the Sheriff, who makes a return of his proceedings. We think it amply sufficient, to divest Jean Gravier of all his rights. This sale was made in 1816, and Gravier died in 1834; yet there is no evidence, he ever claimed the property or complained of the sale.

Whether the sale includes the ground in controversy, depends upon the remaining question in the case.

The description of the property in the sale from Livingston to Harman, seems to us definite and particular; the previous descriptions in other acts conform so nearly to it, there cannot exist a doubt as to the identity. In all those acts specific boundaries are given, viz: from Chesneau's boundary to that of Moquin, which is a sale *per aversionem*, or a sale from one fixed boundary to another, which has always been held to include all the ground between the points mentioned, whether the measure be correctly stated or not. L. C. art. 2471; 14 L. R. 497; 3 L. R. 91; 5 N. S. 243.

A sale, where specified boundaries are given, is *per aversionem*, and includes all the ground between the points mentioned, whether the measure be correctly stated or not.

The witnesses all state, there was a fence on the line between Moquin and the brick-yard; Pilie says, the property was enclosed by Harman's Heirs or their agent by a fence on Hevia and St. Paul streets, connecting it with Moquin's line, on which there was already a fence; and in front on Circus street. Other witnesses speak of this possession and enclosure, or reparation of existing enclosures. We think, the plaintiffs have made out their case.

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The judgment of the District Court is therefore affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The balance to the credit of a partner on his individual account, over and above the debit, should belong to him exclusively, and not one half of it go to the other partner.

Where a witness swears that what is written in a certain document is correct, it does not imply that it contains a full statement of all the affairs of the partnership; as he does not swear that it contains every thing relating to the partnership affairs.

An affidavit, by counsel, stating that the defendant (who is absent) expects to prove certain facts by a witness, and has used all due diligence to obtain him, is insufficient to grant a continuance.

Motions and affidavits for new trials, on the ground of newly discovered evidence, should be received with great restriction and much caution.

This is an action for the settlement of a particular partnership, and the recovery of a balance of \$454, which the plaintiff alleges is due to him on a final liquidation and close of their affairs, by the defendant. He filed an account showing this balance and which is annexed to the petition.

The answer negatives all the allegations in the petition and

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pleads the want of amicable demand. The defendant afterwards filed a peremptory exception, that the suit could not be maintained, because the plaintiff claimed a certain sum and not a liquidation of the partnership.

Upon these pleadings and issues the parties went to trial.

The facts of the case, as exhibited on the trial, are fully stated in the opinion of this court.

There was judgment for the balance claimed, and after an unsuccessful effort to obtain a new trial, the defendant appealed.

M^r Kinney, for the plaintiff.

Haynes, for the defendant and appellant.

Garland, J. delivered the opinion of the court.

The plaintiff alleges he and defendant, in the month of January, 1837, entered into partnership for the purpose of *carrying on the boat breaking and lumber business* in the cities of New Orleans and Lafayette. William Granger was for a few months connected with them, but withdrew, and they carried on the business until about the 15th of September, in the same year, when they dissolved their connection. This suit is to recover a balance which the plaintiff says the defendant owes him upon a full settlement of their accounts, also the sum of \$155, which he says is the half of a debt of \$311 which the firm owed a Mrs. Winters, whom the plaintiff afterwards married, his own half being extinguished by the marriage and confusion, or in some other mode not exactly shown to us. The defendant gave a general denial to the whole demand; there was judgment against him for four hundred and fifty-four dollars and sixty cents and he appealed.

It does not appear what capital either partner brought into the concern, but probably none; they had a clerk who kept a book, which is produced, wherein there are but some memorandums and two accounts that are material in this controversy, one in the name of the plaintiff and the other in that of

the defendant. Their business with most other persons appears to have been conducted on the cash system. On this book the plaintiff has credit for \$2119 01, and is charged as debtor \$1846 56, which leaves him a creditor of the firm \$272 45. The defendant, on his account, is credited with the sum of \$1314 43, and charged with \$680 93, which leaves him a creditor of the firm \$633 50. The plaintiff in his statement of the accounts sets forth all this matter, then deducts his balance of \$272 45 from the defendant's balance of \$633 50, which leaves a balance of \$361 04 in favor of defendant; and this the plaintiff divides into halves, appropriating one to himself. This may accord with some process of arithmetic, but it is not according to the old rules by which we were taught. They induce us to believe that the plaintiff, instead of taking this \$180 52 to himself, ought to allow it to the defendant.

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The balance to the credit of a partner on his individual account, over and above the debit, should belong to him exclusively, and not one half of it go to the other partner.

The account then goes on to charge the defendant with \$635 12½, the one half of a quantity of lumber he took after the dissolution of the partnership, from the triangular yard, which appears correct, as both Richardson and Ives swear he took it; but from this sum the plaintiff only deducts \$180 52, when we think he ought to have deducted the sum of \$361 04, which would leave a balance of \$274 08 owing to the plaintiff, for which sum it appears to us he ought to have judgment.

We have carefully examined all the evidence in the case, which is very loose and confused, and we see nothing else to which the defendant is entitled. His counsel relies very much on the document F. 4, which he says contains a full statement of *all the affairs* of the concern, and urges us to believe that Richardson, the clerk, swears it does. We do not think his declarations go so far. He says what is written in it is correct, but does not swear it contains every thing relating to the affairs of the partnership, and an inspection of the account book shows it does not.

Where a witness swears that what is written in a certain document is correct, it does not imply that it contains a full statement of all the affairs of the partnership; as he does not swear that it contains every thing relating to the partnership affairs.

It is further urged that entries have been made in the book since the dissolution of the partnership. This is perhaps true, but the defendant ought not to complain of it as those entries

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go to decrease the balance in favor of the plaintiff, at the time of the dissolution of the partnership, nearly \$200, and he does not allege or show those entries to be erroneous.

Richardson, the clerk of the parties, says he made the settlement of all the accounts and valuation of the stock on hand, at the request of both parties, and we see no error in it other than that stated.

The defendant urges that much injustice was done him by a refusal to continue the cause, when called for trial, on the affidavit of his attorney. The strongest exposure we can make of the insufficiency of the affidavit offered is to quote it *verbatim et literatim*.

An affidavit, by counsel, stating that the defendant (who is absent) expects to prove certain facts by a witness, and has used all due diligence to obtain him, is insufficient to grant a continuance.

“Defendant expects to prove by Parker, a witness in his behalf, that plaintiff took possession and sold the property which is alleged to be on the triangle; that all due diligence has been used to obtain said witness. Defendant, Maltby, is now in Texas.” (Signed) F. Haynes. This affidavit is wanting in various essential requisites, and the judge did not err in refusing a continuance on it.

We see nothing in the defendant's second bill of exception or his peremptory exception founded on law. The action, it appears to us, is precisely what he says it ought to be. The plaintiff sues for a balance which he says is due him on a settlement of the partnership accounts. We know of no law which forbids a party, when suing for a settlement of accounts, to claim a balance as due to him. It is to recover such supposed balances suits of this description are instituted.

The defendant alleges the inferior court did him great injustice in refusing him a new trial, and he earnestly urges us to grant him this privilege. His principal ground is evidence discovered since the trial. We have said on more than one occasion that motions of this kind are frequently made as the last desperate efforts of a party, and the affidavit should be received with great restrictions and much caution. This affidavit says, “this evidence was unknown before the trial and judgment rendered in this case, although defendant used every ef-

Motions and affidavits for new trials on the ground of newly discovered evidence should be received with great restriction and much caution.

fort and diligence to obtain the same." It does not appear the defendant took out a subpoena for a single witness or asked for a commission to take testimony previous to the trial. Two of the witnesses it seems reside here, the residence of the other two are said to be unknown; it would have been better if the defendant had stated some facts from which we could judge of the diligence he used to procure his evidence, as it appears very strange that such a host of witnesses and documents could be found within three days after the judgment, when not one could be found before, although the suit had been pending more than a year. We think the judge did not err in refusing a new trial.

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FREDWOST
& WIFE
vs.
DAILY ET AL.

The judgment of the District Court is therefore annulled, avoided and reversed; and this court proceeding to give such judgment as, in their opinion, ought to have been rendered in the court below, do further adjudge and decree that the heirs and legal representatives of William Burton, deceased, do recover of and have judgment against the defendant, William Maltby, for the sum of two hundred and seventy-four dollars and eight cents, without prejudice to the claim of Mrs. Burton, late Mrs. Winters. The defendant to pay the costs in the District Court, and the plaintiff those of this appeal.

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FREDWOST & WIFE vs. DAILY ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An action for damages, claiming \$500 for injury sustained in assaulting and beating the plaintiffs, without provocation. Judgment for the full amount, supported by the evidence and affirmed.

This is an action for assault and battery committed on both plaintiffs by the defendants Peter and Owen Daily, claiming \$500 in damages.

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The defendants pleaded a general denial; and aver, that if they used any violence it was done in a passion without knowing what they were doing.

The evidence fully proved the assault and beating of the plaintiffs without the least provocation. The jury assessed the damages at \$500, the full amount claimed. There was judgment confirming the verdict from which the defendants appealed.

M. Kinney, for the plaintiffs.

Preston, contra.

Garland, J. delivered the opinion of the court.

This is an action for an assault and battery, committed on both the plaintiffs, who say they were beaten in a most cruel manner, and lay their damages at \$500. The defendants first plead the general issue and further say if they did beat the plaintiffs, they were in a "great passion without knowing what they were doing and upon great provocation such as ought to excuse what they may have done."

The evidence shows that both the defendants were intoxicated, riotous and noisy in a coffee-house where Fredwost was seated playing dominos with another person. It does not appear the plaintiffs gave either of the defendants the slightest provocation, to justify one of them in knocking down and kicking the woman, and the other in beating the man in such a manner as to confine him to his bed for nearly a week, according to the testimony of the attending physician and another witness.

The judgment is for the full amount of the damages claimed and we see no reason to reverse it.

The judgment of the District Court is affirmed with costs.

PRIOLLAUD vs. HURST ET AL.EASTERN DIS.
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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When the period within which a certain condition is to be performed has not yet arrived, the party is not *in morâ*, and the complaint of not complying is premature. In the meantime the adverse party must perform his part of the contract.

This is an action for the rescission of the sale of three squares of ground in Hurstville. The plaintiff alleges he was induced by the advertisement and plan of the town of Hurtsville to buy these squares, on which plan a rail-road figured, representing a rail-road running from the river Mississippi through Nashville street, to the Carrollton Rail Road, with an extensive car house in the middle. That in fact no such rail-road ever existed, but was falsely and fraudulently represented to deceive purchasers. He therefore prays for an injunction to restrain and enjoin an order of seizure and sale which had issued against these squares or lots of ground and that the sale be rescinded.

The defendant denied any fraud or concealment in the sale of the lots or squares in question, and negatived the allegations in the petition.

On the trial the plan and advertisement were produced in evidence. The plan on its face contradicted the allegations of the petition. Instead of a rail-road, the inscription on it was, "Nashville Rail-Road projected."

Upon the evidence adduced, which showed no deception or concealment in the sale of the lots, there was judgment for the defendant; and also dissolving the plaintiff's injunction. He appealed.

Roselius. for the plaintiff and appellant.

M. Kinney, contra.

Martin, J. delivered the opinion of the court.

The plaintiff having purchased several squares of ground in

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the town of Hurstville, from the defendant, and having failed to make his payment, the latter obtained an order of seizure and sale, whereupon the present suit was brought to rescind the sale of said squares, and a provisional writ of injunction sued out to suspend the execution of the order.

The alleged ground of rescission is, that the vendor exhibited a plan of the new town, on which a rail-road was marked with a depot designated near the squares purchased by the plaintiff, although no such rail-road or depot existed at the time of sale; and every probability of the establishment of such a road has long ago vanished. That this was done with the view of deceiving purchasers; and among them the plaintiff.

The defendant pleaded the general issue, and that the plaintiff had a clear knowledge of his intentions, which were plainly stated and explained at the time of the auction sale and in the advertisements which preceded it.

The injunction was dissolved and there was judgment in favor of the defendant; from which the plaintiff appealed.

When the period within which a certain condition is to be performed has not yet arrived, the party is not *in mora* and the complaint of not complying is premature. In the meantime the adverse party must perform his part of the contract.

The plan of Hurtsville contradicts the allegations in the petition; the inscription on the plan being, "Nashville Rail-Road projected." The advertisements, which preceded the auction, announced that one half of the lots in the town, only, would be sold, and the other half reserved to be offered to the Nashville and New Orleans Rail-Road Company for the purpose of building a branch road to the designated depot in Hurstville; and in case it was not accepted before the completion of this road to Nashville, then these squares or lots shall be sold for the purpose of constructing a branch of said road.

It appears that the offer was made to the New Orleans and Nashville Rail-Road Company and declined, for reasons which entirely exculpate the defendant; and as on this refusal he was not bound to sell the reserved lots for the purpose of making a branch rail-road to Hurstville, until the main road reached Nashville, a period which has not yet arrived, he is not *in mora*, and the complaint of the plaintiff is therefore premature.

The plaintiff's counsel has further contended that the defen-

dant has made a cession of his property to his creditors and is unable to comply with the conditions of the sale. The cession was neither alleged nor proved, and consequently cannot be examined or noticed in this case.

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It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

GIRAGHTY vs. SAULET ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY
OF NEW ORLEANS.

Where materials were furnished, and work done on the defendants' premises, and for their benefit, they are bound to pay the value, although the work was not stipulated for in the contract for other work done at the same time.

This is an action to recover the balance due on a paving contract between the plaintiff and defendants, F. Saulet, and Madame Foucher, and for extra work done in paving corners of defendants' property, according to a detailed account annexed, and with the contract between them.

The plaintiff shows, that by contract he agreed to pave the banquettes or side-walks of defendants' property, situated in the Second Municipality, for \$3 25 per running foot; they paying him two-thirds, and he agreeing to look to the Municipality for the other third. He further shows, that he completed the work, and paved the corners of their property; the latter of which he claims as for extra work done; and that the defendants, on paying him two-thirds, received the other third from the Municipality, and refuse to pay it over, or to pay him for the extra work. He prays judgment for a balance of \$875 75 against Saulet, and \$231 66 against Madame Foucher.

The defendants, in their joint answer, pleaded a general de-

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nial: and averred, they were not bound by their contract to pay separately for work done on the corners, and that they had settled and paid all they bound themselves for, by the terms of said contract.

The evidence supported the facts alleged by the plaintiff, but the Parish Judge was of opinion, the plaintiff could only recover the balance, which the defendants received from the Second Municipality, according to his contract. There was judgment for this amount in favor of the plaintiff, and the defendants appealed.

The plaintiff prayed an amendment of the judgment in his favor, allowing him his entire claim.

Lockett & Micou, for the plaintiff.

Pichot, contra.

Morphy, J. delivered the opinion of the court.

Plaintiff undertook to do certain paving and curbing on the banquettes of property belonging to defendants, at the price of \$3 25 per running foot, of which price defendants agreed, that they should pay two-thirds, and required, that plaintiff should collect, at his own risk and charge, the remaining one-third from the Council of the Second Municipality. The work was done to the satisfaction of defendants, who made a settlement with plaintiff on the 11th of May, 1838, in which it is stated, that the settlement is not a final one, because there is some dispute or difficulty as to the work done at the several corners of the property. It is admitted, that notwithstanding the terms of the contract, defendants applied for and received from the Second Municipality the one-third of the expense of paving, which under the ordinances they were bound to pay; the object of this suit is, to recover the difference between the amount so received by defendants for one-third of the work, and that allowed to plaintiff in the settlement, and some compensation for work done on eight corners of the property, belonging to

F. Saulet, and seven corners of that of widow Foucher. The Judge below gave judgment for the surplus of money received of the Second Municipality, but disallowed the balance of the claim. The defendants appealed; and the plaintiff prayed for an amendment of the judgment, which he contends should have granted the whole of his demand. This case having been submitted without argument, it is not easy for us to perceive the grounds, on which plaintiff's demand is resisted. There could hardly be any dispute as to the portion of the claim allowed by the Judge below. By his contract with defendants, plaintiff was to receive \$3 25 per foot for two-thirds of the work, and he was to be paid for the other third by the Municipality at the usual price, which we understand is \$3 50 per foot. The defendants who have received this difference, are clearly bound to pay it over to plaintiff, who under his contract was entitled to it. We cannot see any more difficulty in the other part of the claim. Defendants engaged to pay \$3 25 per *running foot*, without any reservation whatsoever; materials have been furnished, and work has been done at the corners of their property as well as in the other parts of it. Had they intended, not to pay any thing for that portion of the banquettes at the corners, which is not exactly in front of their property, they should have made a stipulation to that effect; plaintiff would or would not have assented to it; but having made no such reservation, and having suffered plaintiff to do this part of the work, as well as the rest, defendants are bound to compensate him for it. We understand, that it is customary with the Second Municipality, not to pay any proportion of that part of the work; and that this is the ground, on which the claim is resisted. If such was the well known rule or usage in the Second Municipality on this subject, defendants must have expected to pay the whole cost of that portion of the banquettes; for it cannot be supposed, that they intended to have left it undone. Their refusal to pay appears to us the more unreasonable, as plaintiff has deducted from his claim one-third of the cost of this part of the work; thus placing them in the same

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Where materials were furnished and work done on the defendants' premises and for their benefit, they are bound to pay the value, although the work was not stipulated for in the contract for other work done at the same time.

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situation, as though the Municipality had contributed their ordinary proportion of the expense.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be reversed ; and proceeding to give such judgment, as in our opinion should have been rendered below : It is ordered and adjudged, that plaintiff do recover from François Saulet three hundred and seventy-five dollars and 75 cents ; and from widow Foucher the sum of three hundred and forty-five dollars and 66 cents ; and that each of said defendants pay one-half of the costs in both courts.

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STATE vs. JUDGE OF DISTRICT COURT.

AN APPLICATION FOR A MANDAMUS.

An injunction should not be granted to suspend an execution, on the ground that the petition for a suspensive appeal and appeal-bond were lost, before the appeal was granted.

The resignation and subsequent failure of one of the plaintiffs, who was a party to a judgment as Sheriff, furnish no excuse for the defendant, to withhold payment to his successor in office.

This is an application for a mandamus, to compel the District Judge to grant an injunction in a certain case, to stay an execution.

Thomas Hughes, J. Bellow Jr., C. F. Hozey as Sheriff, recovered a judgment against the La. State, Marine and Fire Insurance Co., on a policy of insurance on the schooner Frederic Arnet.

The attorney for the Insurance Company alleges, he filed his petition with the clerk, and an appeal-bond, to obtain a suspensive appeal in said case ; but that both the petition and bond have been lost or mislaid, and the time elapsed for obtain-

ing such appeals. He further states, that execution has issued on said judgment, and the Sheriff is proceeding to seize and sell property; that the judgment is partly in favor of Hozey, in his official character as Sheriff, and he has resigned, and also made a surrender of his property, and is not entitled to receive any of said money. That he applied for an injunction, to restrain and prohibit the Sheriff from proceeding on said judgment and execution; which was refused; and he prays for a mandamus, compelling him to grant the said order and writ of injunction.

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A rule was taken on the District Judge, to show cause, why the mandamus should not issue as prayed for.

The Judge showed cause, and the court took the case into consideration.

C. M. Conrad, for the application.

Martin, J. delivered the opinion of the court.

On a rule to show cause, why a mandamus should not issue, directing the District Judge to grant an injunction in the case of Thomas Hughes et al. vs. Louisiana State, Marine and Fire Insurance Company, he showed for cause, that the injunction had been demanded on three several grounds :

1. That the defendants in the above suit had deposited in the Clerk's office of the District Court a petition and appeal-bond from the judgment rendered against them, within the legal delay for a suspensive appeal; which petition and bond have been lost.

2. That the said judgment is jointly in favor of C. F. Hozey, in his official character as Sheriff; but that he has resigned, and is no longer authorized to receive said debt.

3. That Hozey has made a surrender of his property to his creditors, and can no longer sue for or receive monies due to him individually prior to his cession.

It appears to us, that the applicant has mistaken his remedy, if any there be. On discovering, that his petition and appeal-

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An injunction should not be granted to suspend an execution, on the ground that the petition for a suspensive appeal and appeal-bond were lost, before the appeal was granted.

The resignation and subsequent failure of one of the plaintiffs, who was a party to a judgment as Sheriff, furnish no excuse for the defendant to withhold payment to his successor in office.

bond were lost, it was his duty, immediately to do every thing in his power, to prevent the ill consequences of this accident. He should have prepared another bond, and presented it to the Judge, with a new petition of appeal; stating the previous facts, and loss of the first ones. The Judge might then have considered, whether these facts authorized the granting of any other, than a devolutive appeal; and if they did, whether the execution, that had issued in the meantime, might have been enjoined. If the party thought himself injured by the decision of the Judge on either of these points, he might then have resorted to us for relief. Were we to order an injunction to issue, the execution of a judgment, from which there is no appeal, would be indefinitely suspended.

II. The resignation of Hozey, one of the plaintiffs in said judgment, as Sheriff of the Parish, may give rise to the question, whether his successor, when the money is received, may pay it over to him, or retain it by virtue of his office; but it is no reason to delay the collection.

III. If Hozey has failed, and ceded his property to his creditors, the right of the Syndic, to receive the money when collected, may also give rise to another question; but this is no reason, why the collection of it should be delayed.

It is therefore ordered, that the rule be discharged.

HARRAL vs. VANORSTEN.

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

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vs.
VANORSTEN.

Surgeons of regiments in the state militia, have the same rank as those in the U. S. Army, whose duty it is to attend those who may be wounded in the service, or on parade as a militiaman.

So a regimental surgeon cannot make a private charge and be entitled to compensation for dressing the wounds and curing a soldier wounded *on parade*, even when not in active or actual service.

This is an action on a physician's account for services rendered in dressing the wounds and curing the defendant, who was severely hurt while on parade the 22d February 1839, by the accidental explosion of a cannon.

The plaintiff alleges that the defendant is indebted to him for his attendance as a physician and surgeon in the sum claimed, and for which he prays judgment.

The defendant denied that the plaintiff's services were worth what he charged, even if he (defendant) was responsible; which he denied. That the plaintiff, being surgeon to the 4th regiment, was present in his official character, when this defendant was severely wounded by the explosion or premature discharge of a cannon, and attended, dressed his wounds and rendered the necessary medical aid until he was cured, which his duty required of him to give to every officer and soldier who might be wounded or injured in actual service, on parade or otherwise, without being entitled to receive from such persons any compensation whatever.

Upon these pleadings and issues the case was tried.

The evidence accorded with the allegations. There was judgment for the defendant and the plaintiff appealed.

Greiner, for the plaintiff.

Benjamin, contra.

Garland, J. delivered the opinion of the court.

This is an action to recover the sum of \$897 75 balance of

EASTERN DIS.
May, 1841.

HARRAL
vs.
VANORSTEN.

account for services rendered as a physician and surgeon. The defendant resists the payment on the ground that it was the duty of the plaintiff to attend on him without compensation.

It appears the plaintiff is the surgeon of the 4th Regiment of Louisiana Militia. The defendant is a private in an artillery company attached to that regiment. On the 22d of February, 1839, both plaintiff and defendant being on parade, the latter in obedience to the command of his proper officer was loading a cannon, which was fired prematurely, or exploded, and severely wounded him. The plaintiff was immediately called to attend him, and not only did so that day, on the ground, but faithfully attended him afterwards, until the 4th of May following; and, by his skill and attention, probably saved defendant's arm from being amputated. The evidence not only establishes the services, but their value. On the part of the defence it is shown by two physicians, who have been surgeons of regiments, that they consider the appointment of Regimental Surgeon as honorary, and each of them say they have attended a person for a considerable time in nearly or exactly the same situation, and did not suppose they were entitled to charge for their services; and one of them had refused compensation when offered.

The counsel for the defence relies on the custom, which he contends he has proved, and upon the law, which makes it the duty of the plaintiff to have attended on his client.

The first ground of defence we think cannot avail him, as he has not proved enough to establish the existence and generality of the custom; 7 La. Rep. 215, 321, 529; nor has he shown it has been generally acquiesced in; 14 Idem 490.

Surgeons of regiments in the state militia, have the same rank as those in the U. S. Army, whose duty it is to attend those who may be wounded, in the service, or on parade as a militiaman.

The second ground is more tenable. By the 6th section of the act, 1834, relative to the militia, p. 143-4, a surgeon is a constituent part of every regiment. The 15th section says, surgeons in the militia shall have the same rank as surgeons in the army of the United States. The 17th section assimilates the duties to those of officers of similar rank in the army of the United States; and it is well known that the peculiar duties of

surgeons in that service, are to attend upon those who may be wounded whilst in the discharge of their duties, and a regular compensation is allowed them by law. We are bound to presume the legislature have some object in view in the creation of every office known to our laws, and if to some officers no compensation is allowed, it is upon the assumption the duties required of them would be so light and irregular, that none that would be adequate could be affixed. But when it shall be made known to the legislature that actual and beneficial services have been rendered, we are not at liberty to doubt their disposition to compensate the officers who have performed them.

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May, 1841.**

**HARRAL
vs.
VANOSTEN.**

So a Regimental Surgeon cannot make a private charge and be entitled to compensation for dressing the wounds and curing a soldier wounded on parade, even when not in active or actual service.

We think surgeons are appointed for some purpose, and we know of none more appropriate than dressing the wounds of those who have received them whilst obeying the orders of their officers on parade. It is sufficiently hard on a citizen to be taken from his ordinary pursuits to attend to militia duty and suffer the pain from wounds received in consequence, without being compelled to pay all the expenses attending his cure. We believe it was the duty of the plaintiff to attend on the defendant and he must look for compensation to those in whose service he was engaged.

We are not to be understood as coinciding with the plaintiff's counsel in the extent to which he thinks the principle established may carry us. We do not think the plaintiff is to be physician of the regiment in ordinary cases as well as surgeon, but in cases like the present, his official name indicates his duties as distinctly as we can state them.

The judgment of the Commercial Court is therefore affirmed with costs.

EASTERN Dis.
May, 1841.

DUNCAN vs. HAWKS ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

DUNCAN
vs.
HAWKS ET AL.

The plaintiff must allege and prove, that the act of the master of a vessel, in taking on board his slave, and employing him as a cook, caused him an injury which the owners could have prevented, but did not, in order to render them liable.

The statute of 1835, making the *owners of vessels* and steamboats liable for the value of slaves, carried out of, or from one part of the State to another, without the consent of the owners, does not apply to a case, where the master merely employs the slave as a cook on board of his vessel in port, for a few days.

The plaintiff alleges, he is the owner of a slave, who absconded, and that the defendant, who is master of the schooner *Molaeska*, while lying in port, employed his said slave as a cook on board for several days, without his (plaintiff's) knowledge or consent, and to his damage, in the loss of time and diminished value of said slave, in the sum of \$1000. He demands, that the defendant be arrested; the owner being also responsible, and residing out of the State, that the vessel be provisionally seized; and that he have judgment for his damages, with privilege on the schooner for the payment thereof.

The owners appeared by counsel, and excepted to the plaintiff's petition, averring that he showed no cause of action against them, nor against the schooner owned by them.

The defendant Hawks, master of the vessel, excepted to the jurisdiction of the court; that the law granted to the criminal court exclusive jurisdiction of such matters; and that this suit is premature and cannot be maintained, because the law does not allow a civil suit for damages, as in this case, unless the same be instituted subsequently to, or at all events concurrently with, the criminal prosecution.

Upon these pleadings and issues, the District Court gave judgment, sustaining the exceptions of the owners; and dismissing the suit as to them; and overruling those of the defendant. The plaintiff appealed.

Eustis & L. C. Duncan, in propria persona, for the ap-

pellant, insisted, that the construction given to the statutes, in relation to the transportation and employment of slaves, without the knowledge and consent of their owners, was erroneous, and the judgment should be reversed. 1 Moreau's Dig. 379, 380; Acts of 1839, p. 120; Idem, 1835, p. 152.

EASTERN DIS.
May, 1841.

DUNCAN
vs.
HAWKS ET AL.

Benjamin, contra.

Morphy, J. delivered the opinion of the court.

The petition charges, that plaintiff's slave, a cook, having absconded from him, was found on the 29th of May, 1839, in the employ of J. B. Hawks, master of the schooner Molaeska, lying in the port of New Orleans, and about to sail for Tampa Bay or New York; that said slave was and had been for some days employed by said Hawks as a cook on board the schooner, and was so employed without the knowledge or consent of the petitioner; and to his damage in the loss of time and the diminished value of his slave, in the sum of one thousand dollars. The petition concludes with a prayer for a provisional seizure of the vessel, to secure his lien on her, and for a judgment *in solido* against her master and owners. To this petition, the defendants filed separate exceptions. The master put in a plea to the jurisdiction of the court, which was overruled; and the defendants demurred to the sufficiency of the matters set forth by plaintiff, as furnishing against them any right of action. This last exception having been sustained, plaintiff appealed.

From the averments in the petition it is clear, that the owners of this schooner are sought to be made liable, not on a contract made by the master in the scope of his powers, but for a tort by him committed, to wit: the receiving and employing of a slave on board, without the consent or knowledge of his master, in violation of our laws. The petition does not allege, that this illicit act, which has caused injury to plaintiff, could have been prevented by the owners, and that they have not done it. Under the repeated adjudications of this court, and a positive provision of our laws, the averment and proof of this

The plaintiff must allege and prove, that the act of the master of a vessel in taking on board his slave, and employing him as a cook, caused him an injury, which the owners could have prevented, but did not, in order to render them liable.

EASTERN DIS. circumstance is necessary to render principals accountable for
May, 1841. damages, resulting from the acts of their agents. La. Code,
DUNCAN art. 2299; 1 Moreau's Digest, 119 and 121, 379 and 380;
vs. 8 Martin, N. S. 504; 8 La. Rep. 587.
HAWKS ET AL.

The statute of 1835, making the owners of vessels and steamboats liable for the value of slaves, carried out of, or from one part of the State to another, without the consent of the owners, does not apply to a case, where the master merely employs the slave as a cook on board of his vessel in port, for a few days.

The statute of 1835, which is relied on as giving plaintiff a privilege on the schooner, and as establishing the absolute liability of her owners, cannot, in our opinion, be made to apply to the case before us. It declares, that if any slave or slaves be carried out of this State, or from one part of the State to another, without the consent of the owner, in addition to the remedy already given to the owner of said slave or slaves, against the persons mentioned in the act, approved the 13th February, 1816, the owner shall be entitled, besides, to sue the owners of said steamboat, ship, vessel or other watercraft, and to recover the full value of the slave or slaves so carried away, with damages, and the said owners shall be considered bound jointly and severally to make good such claim. See Acts of 1835, p. 152, sec. 1 and 2.

From the express term of this amendment to the law of 1816, it is clear, that for the greater protection of this species of property, the Legislature intended to render absolute and unconditional the liability of owners of vessels in two cases, to wit: when a slave is carried out of the State, or when he is removed from one part of the State to another, leaving, in all other cases, the law as it stood before in relation to the liability of such owners for the acts of their agents, and to the remedies already given by existing statutes. In the present case, the slave, who had only been employed on board a few days, was recovered by plaintiff; the master was undoubtedly liable to him in damages, independent of the criminal prosecution, to which he had subjected himself by his unlawful act: as to the owners, their exception appears to us to have been rightfully sustained.

The judgment of the District Court is therefore affirmed with costs.

DERBIGNY vs. PEIRCE, Dative Testamentary Executor, &c. **EASTERN Dis.**
May, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW ORLEANS.

DERBIGNY
vs.
PEIRCE,
DATIVE
TESTAMENTARY
EXECUTOR, &c.

182 551
51 175
18 551
111 679

The order of the Court of Probates for the registry and execution of a will and appointment of a Dative Testamentary Executor form a judgment, which must have its effect until reversed by appeal, or action of nullity.

An action of nullity will not lie, unless for some one of the enumerated grounds mentioned in the Code of Practice.

The plaintiff admitted he was indebted to the succession of the late Francisco Tacon, in the sum of \$11,000, which he was ready and desirous of paying, but he denied that the defendant was properly authorized to receive it and give him a valid acquittance therefor. He prayed that Levi Peirce, Esqr., be cited and that the order of court appointing him Dative Testamentary Executor be annulled and set aside; and that the court provide for the disposal of said sum of money, and for his valid discharge and the release of mortgage resulting therefrom.

The defendant averred he was regularly and legally appointed Dative Testamentary Executor of the last will of Francisco Tacon, deceased, and as such authorized to receive the debt due his estate; and that by substitution he is also attorney in fact and agent of Louis Potestad the executor of said decedent in Philadelphia, and he annexes his powers. He prayed for general relief, &c.

Upon these pleadings and issues the parties went to trial.

The Judge of Probates decided that this was an action of nullity, but he was unable to perceive any nullity in the order, sought to be annulled. There was judgment dismissing the suit and the plaintiff appealed.

Labarre, for the plaintiff.

Defendant in propria personâ.

Martin, J. delivered the opinion of the court.

EASTERN DIS.
May, 1841.

DERBIGNY
vs.
PEINCE,
DATIVE
TESTAMENTARY
EXECUTOR, &c.

The plaintiff acknowledges himself to be a debtor of the estate of the late Francisco Tacon, and alleges that the appointment of the defendant as Dative Testamentary Executor of the deceased, is illegal and void; the testator having left an executor who qualified under the will in the City of Philadelphia; the place of the testator's decease. He prays that the appointment be rescinded; and that the court make such provision as will enable him to liberate himself by paying what he owes to said estate, to some person duly authorized to receive it.

The defendant answered that besides being dative executor as aforesaid he is the attorney in fact of the executor under the will, who resides in Philadelphia; and as such is authorized to receive the money and grant a full discharge of the debt and mortgage.

The Court of Probates considered this action as one of nullity, and declared that it was unable to perceive any ground of nullity; dismissed the suit. The plaintiff appealed.

The counsel of the plaintiff contends; 1. That the pretended testament, offered in evidence, is nothing but a copy of a transaction made in Philadelphia of an instrument of writing purporting to be a testament. 2. That the testament or a copy with the necessary authentication can alone be received in evidence; and that neither a translation or a copy of a translation made out of the state, can be considered as legal evidence in our courts. 3. The Probate Court had no evidence before it upon which to order the execution of the will; nor to appoint a dative testamentary executor.

The order of the Court of Probates for the registry and execution of a will and appointment of a Dative Testamentary Executor form a judgment, which must have its effect until reversed by appeal or action of nullity. It appears to us that the order for the registry and execution of the will, and the appointment of a dative testamentary executor, form a judgment which must have its effect until it be reversed by appeal in this court; or in an action of nullity in the Court of Probates. The plaintiff has resorted to the last mode; and the Court of Probates has correctly concluded that he has mistaken his remedy. The original judgment sought to be set aside, in the present suit, is not appealed from. We

therefore cannot attend to any objections to its correctness or legality. EASTERN DIS.
May, 1841.

The judgment in the action of nullity is the only one before us. The legislature has specially enumerated in the Code of Practice, the grounds on which a judgment can be declared null by the court which had rendered it; C. Pr. art. 606, 607 and 608. The nullity sought is not enumerated in any of the above articles, and the grounds set forth do not exist in the case before us. CROCKER
vs.
MONROSE.

An action of nullity will not lie, unless for some one of the enumerated grounds mentioned in the Code of Practice.

The plaintiff required the Court of Probates to make some provision for his liberation from the debt by a valid payment which he declared he was ready to make. Had he pointed out a specific provision he might have called on us to say whether the court erred in refusing to make it. The court was not bound to select any, on a general proposition for relief. He would not have been assisted by the reversal of the judgment of the Court of Probates.

It is therefore ordered, adjudged and decreed that the judgment of the Probate Court be affirmed with costs.

18 553
111 685

CROCKER vs. MONROSE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The pledgee is bound to take care of the thing pledged as a prudent administrator, and is answerable for the loss or decay of the pledge occasioned by his fault or negligence.

The pledgee, in case of destruction of the pledge by inevitable accident, must prove the identity of the pledge, and that he used every diligence and care to preserve and save it, to entitle him to recover back the sum advanced on it.

This is an action to recover the sum of \$312, which the plaintiff alleges he advanced to the defendant's wife on the pledge of her jewels. He expressly states that the defendant

EASTERN DIS.
May, 1841.

CROCKER
vs.
MONROSE.

authorized his wife to make said pledge, and receive the money on it, and which enured to his benefit. He also produces the wife's receipt for the money and description of the articles put in pledge; and alleges they were destroyed by the burning of his house which happened through unavoidable accident.

The defendant after pleading the general issue, set up a reconventional demand for the return or value of the jewels put in pledge, which he described and estimated at \$600. He avers he tendered back the money and demanded the return of the pledge which the plaintiff refused.

The evidence is fully stated in the opinion of the court, and appears to have been insufficient to make full proof of the identity of the pledge, of its actual and inevitable destruction by the burning of plaintiff's house. And on the other hand there was no evidence of the tender.

There was judgment for the defendant, and the plaintiff appealed.

Elwyn, for the plaintiff and appellant.

Sevier, for the defendant.

Simon, J. delivered the opinion of the court.

This suit was instituted on a written instrument subscribed by the defendant's wife, in the following words: "Received, New-Orleans 31st October, 1837, of Elisha Crocker, three hundred and twelve dollars, to be repaid in sixty days from this date, and as a collateral security for the repayment, I do hereby place into his hands, the following articles, viz: 1 pr. diamond ear-rings, two diamond rings, one diamond breast-pin, 1 pr. gold buckles, one pr. gold ear-rings with breast-pin (signed) F. Monrose." Plaintiff also represents that the articles therein mentioned were in his house, *safely* deposited with money and other valuables belonging to him; that said house was during his absence, totally consumed by fire, and that said fire was not to be ascribed to any fault of his or of

any of his agents, and was the result of inevitable accident. He further states that the money was borrowed by defendant through the agency of his wife, *who was authorized by him*, and whose acts he has approved; that the sum loaned was applied to the defendant's own purposes, and that said defendant's wife is in the habit of transacting a great part of his business.

**EASTERN Dist.
May, 1841.**

**CRUCKER
vs.
MONROSE.**

The defendant first pleaded the general issue, and further averred that the Jewels were of the value of \$600; that they were deposited for the repayment of \$312 loaned to his wife; that he never authorized his said wife to borrow said money and give the receipt or obligation annexed to plaintiff's petition. He also alleged that a long time previous to the institution of this suit, he tendered to the plaintiff at his domicil and in the presence of witnesses the amount of the money loaned with interest, and demanded the delivery of the Jewels, but that plaintiff refused to deliver the same; that he made repeated demands at different periods to the same effect; and notified plaintiff of his readiness to repay at any time the said sum of money with interest on his delivering the Jewels, holding said plaintiff responsible for the value of the same to the amount of \$600, which he pleads in reconvention. He prays judgment accordingly.

There was judgment below against plaintiff, and in favor of the defendant, with costs of suit; from which judgment, the plaintiff appealed.

The only evidence adduced in this case, except the production of the receipt sued on, is relative to the destruction by fire of the defendant's Jewels, and it is very loose and unsatisfactory. One of the witnesses shows that plaintiff's house was burned down; that the fire was sudden and rapid; and that some pieces of metal which were white and hard were picked up among the ruins. The other witness proves that he was living at plaintiff's house at the time of the fire; that he saw a box in the house containing Jewels, which box was put on the top of an armoire; that plaintiff took down the box, took out

EASTERN DIS. some specie and put some back again in it; that a day or two
May, 1841. before going away, the plaintiff took the Jewels out of the box
CROCKER and put them back again, and then put the box on the top of
vs. the armoire; that the box was burned with the fire; that he saw
MORROW. the pieces after the fire, found some metal melted up which
 was supposed to be the Jewels, and that he has every reason
 to believe that said Jewels were in the box when the house
 burned up.

With this unsatisfactory evidence, it seems to us that this case is not in such a condition as to enable us to decide upon the rights or liabilities of the parties, and that neither of them is entitled to any judgment at our hands. The plaintiff has adduced no proof of the authorization of the wife by the defendant, nor has he sufficiently established the other allegations contained in his petition, upon which he seeks to make the defendant liable, and to free himself from the obligation of restoring the pledge.

The pledgee is bound to take care of the thing pledged as a prudent administrator, and is answerable for the loss or decay of the pledge occasioned by his fault or negligence.

The pledgee, in case of destruction of the pledge by inevitable accident, must prove the identity of the pledge, and that he used every diligence and care to preserve and save it, to entitle him to recover back the sum advanced on it.

It is true, that according to the *art.* 3134 of the La. Code, the pledgee is only answerable for the loss or decay of the pledge which may happen through his fault; and that under the *art.* 1902, his principal obligation is to take all the care of the thing pledged that could be expected from a prudent administrator; this rule being subject however to further restrictions or modifications. But here the evidence does not satisfy us that the very Jewels in question were destroyed by the fire of the plaintiff's house during his absence, as by him alleged; they are not in any manner identified; and if they were the same, it is not shown that any degree of care and diligence has been used to save and preserve them. If, with regard to the pledgor, he cannot retake the objects pawned without paying the whole amount of the debt in principal and interest; on the part of the pledgee, the restoration of the pledge is a condition without which a recovery cannot be had; they must take place simultaneously; and in order to be discharged from this obligation, the pledgee must show not only that the thing

pledged is lost or destroyed, but also that he unsuccessfully used all necessary care and diligence to preserve it.

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May, 1841.

This makes it unnecessary to inquire into the legal effect of the offer made by the defendant *to pay the amount of the loan*, as even supposing that his (said defendant's) allegations could be considered as a sufficient ratification of the act of his wife, the plaintiff, from the insufficiency of his evidence, would not be entitled to a judgment.

WILLIAMS
vs.
HENDERSON.

As to the reconventional demand set up by the defendant, there is no proof whatever of the value of the Jewels; and were we ready to say that the objects pawned belong to him, and that he has a right of recovering them or their value, we should be without any criterion upon which our judgment could be based.

With this view of the case, we think that the judgment appealed from, so far as it allows nothing to either of the parties, is correct, but that it ought to have been limited to a mere judgment of nonsuit.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs, and that the same be so modified as to have only the effect of a nonsuit.

WILLIAMS vs. HENDERSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a defendant owns a plantation, with a dwelling-house, in a distant Parish, and where he has resided for several years, except occasional absence in travelling, and afterwards opens a commission-house in New Orleans, with a view to try the commission business, and keeps his family at a boarding-house: *Held*, that it is not such a change of domicil, as will authorize a suit against him within two months afterwards at his new residence.

EASTERN DIS.
May, 1841.

WILLIAMS
vs.
HENDERSON.

This is an action against the drawer of a bill of Exchange, drawn at Warrenton, the 23d December, 1836, on Brander, McKenna & Wright, of New-Orleans, and by them accepted; payable to the order of George Henderson, 373 days after date. The bill was duly protested for non-payment at maturity; and on the 1st November, 1840, this suit was instituted against Wm. Henderson, the drawer, for the sum of \$3600, with costs of protest and interest; for all of which the plaintiff prays judgment.

The defendant, without admitting any of the allegations in the petition, pleaded a declinatory exception, declining the jurisdiction of the court, on the ground, that his *legal domicile* and principal establishment are, and for a long time have been in the Parish of Carroll; that he further excepts to the petition, in not setting out the plaintiff's place of residence.

Upon these pleadings and issues the case was tried.

The opinion of the court contains a full and correct statement of the facts and evidence of the case.

There was judgment overruling the exception, and for the plaintiff for the amount of his demand. The defendant appealed.

Th. Slidell, for the plaintiff and appellee, insisted, the judgment was correct, and should be affirmed.

Preston & Emerson, for the defendant and appellant, contended that judgment should be reversed, and one of non-suit rendered.

The defendant's domicile and principal establishment are in the Parish of Carroll, and not in New Orleans. Civil Code, 42, and *Tanner vs. King*, 11 La. Rep. 178.

Defendant *must* be cited at the place of his domicile; Code of Practice, 162; and even if he reside alternately in Carroll and New Orleans, he must be cited, where he appears to have his principal establishment. *Ibid.* 166.

Defendant never declared his intention to *change* his domicile to New Orleans, and has done no acts in that place,

which clearly manifest an intention to make it the place of his domicil. Ibid. 168.

EASTERN DIS.
May, 1841.

WILLIAMS
vs.
HENDERSON.

Simon, J. delivered the opinion of the court.

Defendant is appellant from a judgment rendered against him for the amount of a Bill of Exchange, by him drawn at Warrenton, on the 23d of December, 1836, on the commercial house of Brander, McKenna & Wright, to the order of George Henderson, and subsequently endorsed by the latter.

Our attention is first called to the declinatory exception taken by said defendant, on the ground, that his legal domicil and principal establishment are, and have been for a long time, in the parish of Carroll, and not in the parish and city of New Orleans, in which, he insists, he is not suable.

In support of this declinatory exception, several witnesses have been examined, whose testimony shows, that the defendant *has a plantation* in the parish of Carroll, very well stocked with negroes and every thing else necessary for carrying on a plantation; that he is now improving said plantation, and was lately putting up a nice house upon it; that he has no other real estate in any other parish; that he has had a plantation in Carroll for the last ten years; has resided there since the latter part of 1836, erected a house on the same plantation in the same year, and that with the exception of spending a part of the summer away, he has constantly resided in Carroll from 1836 up to the present time (January, 1841); that his family resides there, but are now in New Orleans, spending a few months *at a boarding-house*; that defendant's and family's principal residence is in the parish of Carroll; that he is a member of the police jury of said parish, and has been repeatedly home, since he came down to the city. On the other hand, it has been established, that the defendant came to this city in September, 1840, opened a cotton commission-house, and published a notice to that effect in the papers; that he has a sign over his door as a commission-merchant; and is here for the purpose of receiving any favorable consignment, which may be made to him:

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vs.
HENDERSON.

that he has rented an office for some time, and rented a part of it out; one of the witnesses testified, that he saw a circular of the defendant's stating that he intended coming here to locate and establish himself, soliciting the patronage of planters and others; that his consignments are small, few and far between, and that he does not receive much cotton. Some of the witnesses stated, that the defendant said, that if he could make certain arrangements, he would quit the commission business and return to his plantation; that he would not accept any drafts, unless he had the cotton in his hands; that he had come down here to try the business; and that, being a member of the police jury, he frequently said, that he would be back in time for the meeting in June.

From this evidence, it does not appear to us clear, that the acts of the defendant are such, as to show on his part a manifest intention of removing from the parish of Carroll to New Orleans, and to make the city the place of his domicile. The 42d article of the Louisiana Code says, that "the domicile of each citizen is in the parish, wherein *his principal establishment* is selected; and that the principal establishment is that, in which he makes *his habitual residence*." The art. 43 provides, that "a change of domicile is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." The art. 44 indicates *an express declaration* made before the judges of the parishes, from which and to which he intends to remove, as being a sufficient proof of intention; and by the art. 45, if not such declaration has been made, the proof of the intention must depend upon circumstances. According to the art, 166 of the Code of Practice, "if a defendant reside alternately in different parishes, he must be cited in that, in which he appears to have *his principal establishment*, or *his habitual residence*;" and "if his residence in each appear to be *nearly of the same nature*, in such a case he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicile." By the art.

167, "if the defendant change his domicil, he must be cited in the parish, where he has resided within the last year, or within that where he has declared, in the manner prescribed by law, that he intended to have his domicil." And in the words of the *art. 168*, "if the defendant has not made such a declaration, he may, nevertheless, be cited in the parish, where he lives, though he has not resided one whole year in it, if he has done in that parish, *acts which manifest sufficiently, that he intended to make it the place of his domicil.*"

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May, 1841.

WILLIAMS
vs.
HENDERSON.

In this case, the defendant has made no declaration, has not resided one year in the city, and our inquiry must consequently be limited to the question, whether from the circumstances shown by the evidence, he has done such acts as to evince a manifest intention of making New Orleans the place of his domicil?

As this court has said in the case of *Waller vs. Lea*, 8 *La. Rep.* 215, "the intention alone, however formally expressed, would not suffice; it must be complied with by the act of residing in the new parish." In the case of *Hennen vs. Hennen*, 12 *La. Rep.* 195, this court held that, "the act of residing *must be combined* with the intention;" and in the language of this court, in the case of *Turner vs. King*, 11 *La. Rep.* 178, "a man's domicil is *his home*, where he establishes *his household*, and surrounds himself with the apparatus and comforts of life."

Where a defendant owns a plantation, with a dwelling-house, in a distant Parish, and where he has resided for several years, except occasional absence in travelling, and afterwards opens a commission house in N. Orleans, with a view to try the commission business, and keeps his family at a boarding-house: *Held*, that it is not such a change of domicil as will authorize a suit against him within two months afterwards at his new residence.

Under a correct application of these principles of law and jurisprudence, can it be said that the defendant has lost or abandoned the domicil which he had in the parish of Carroll, and that he has acquired a new domicil in the City of New Orleans? Or can it be contended that his residence in each place appears to be nearly of the same nature, and makes him suable in either? What are his acts? after having resided for a number of years in Carroll, where all his property is situated, where his household is established, where his family resides, and where he has surrounded himself with the apparatus and comforts of life, he thinks proper and convenient to come down to New Orleans, in September, 1840, (two months before the

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institution of this suit) *to try the business*, to open a cotton commission house, and to offer his services to planters and others as a commission merchant; he does not bring his family with him, except to spend a few months *at a boarding house*. The consignments which he receives, are small, few and far between; he goes *home* repeatedly during the business season; is a member of the police jury of the Parish of Carroll, where he expresses his intention to return in time for the meeting in June; and far from manifesting any determination on a change of domicil, he seems disposed to make such arrangements as to quit the commission business and to return to his plantation.

We cannot agree with the judge *a quo* in the conclusions which he has drawn from the acts of the defendant. They show nothing but an intention on his part to make an experiment, and to try if he could successfully undertake the commission business in New Orleans during the winter; so far he must be considered only as a sojourner; his motives are sufficiently explained by the circumstances, and it does not appear to us that he ever had any intention of remaining in the city longer than it was necessary to try the success of his experiment; his ulterior determination was, perhaps, to depend upon the result of his commercial pursuits, but in the meantime, his domicil and principal establishment continued to be in the Parish of Carroll. We are therefore of opinion that the intention of the defendant being not combined with actual residence, the purposes of the law are not satisfied, and that the District Judge erred in overruling his declinatory exception.

For the same reasons, we do not think that the defendant's short and momentary residence or sojourn in this city is nearly of the same nature with his residence in the Parish of Carroll, so as to be sued in either; he may, perhaps, acquire it hereafter, by subsequent acts; but as the case stands at present, we feel no hesitation in saying that he was not suable in any other parish but in that of Carroll.

It is therefore, ordered, adjudged and decreed that the judg-

ment of the District Court be annulled, avoided and reversed; that the defendant's declinatory exception be sustained, and that this suit be dismissed, the plaintiff and appellee paying costs in both courts.

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HALL & BEIN vs. HENDERSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Defendant's domicile is in the parish where he has resided permanently, notwithstanding his removal to New Orleans with the view to the commission business, and actually opening a commission house.

This is an action on a promissory note for \$1573 45, signed John Henderson & Co., dated at Warrenton, (Miss.) 30th March, 1839, payable the 1st of May following to the order of plaintiffs. They allege that the defendant, William Henderson, is a partner of said firm, and resides at present in New Orleans, and they pray judgment for the amount of said note, interest and costs of protest.

The defendant pleaded his domicile and averred that his residence was in the parish of Carroll. The cause was tried on these pleadings and issues, and also on the evidence taken in the preceding case of Williams vs. Henderson.

There was judgment for the plaintiffs, and the defendant appealed.

Wray, for the plaintiffs.

Emmerson, contra.

Simon, J. delivered the opinion of the court.

This is a suit on a promissory note of hand. The defen-

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dant declined the jurisdiction of the lower court, on the ground that his domicil and principal establishment are in the parish of Carroll and not in the parish of Orleans, and that he ought to have been sued in the ninth judicial district court for the parish of Carroll. This declinatory exception was overruled, and the defendant having answered to the merits by pleading the general issue, there was judgment against him, from which he appealed.

The contest in this case being the same with that in the case of *Williams vs. Henderson*, lately decided by this court, (*ante* 557) as to the question of domicil; both counsel have agreed to submit it without argument, referring us to the testimony taken on the exception in the said case of *Williams vs. Henderson*, to be applied to the declinatory exception in this suit. This is the same evidence on which the question of jurisdiction was submitted to the court below; it ought to be governed by the same principles and reasoning, and our conclusion must consequently be the same.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; that the declinatory exception filed by the defendant be sustained, and that this suit be dismissed; the plaintiff and appellee paying the costs in both courts.

BRANCH BANK OF ALABAMA *vs.* KRAFT ET AL.

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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

BRANCH BANK
OF ALABAMA
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An order on a garnishee to pay over a certain portion of a claim in money when collected, arising from certain notes in his hands, does not effect the notes not yet collected. They still remain the property of the original owner and are liable to attachment by any of his creditors.

This is an action, against J. H. Kraft, to recover the sum of \$21,371, which the plaintiffs allege is justly due them ; and that said Kraft resides permanently out of this state, but has certain property, effects, rights and credits in the hands of James R. Sterrett, Esqr., which they pray may be attached, and that Sterrett be cited as garnishee to answer interrogatories.

The garnishee negatived the interrogatory that he had *any money* under his control or in his possession belonging to the defendant but showed he had a large amount of notes or bills placed in his hands for collection ; and that he had accepted an order to pay over a certain portion of a claim against M. De Lizardi & Co., to D. W. Briggs, Cashier, (so soon as collected) drawn on him by said J. H. Kraft.

There was judgment against the defendant for the sum claimed ; and ordering it to be satisfied out of the effects attached.

Execution issued and all the effects in the hands of the garnishee seized, amounting, according to the sheriff's return, to \$17,900.

A rule was taken on the garnishee to surrender up the notes and effects attached in his hands.

The Planters and Merchants Bank of Alabama intervened in this rule, claiming the amount of the order drawn on Sterrett in favor of their Cashier.

The judge of the Commercial Court gave judgment for the intervenors for three sevenths of the claim on Lizardi & Co., from which the plaintiffs appealed.

Chinn, for the plaintiffs and appellants.

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1. The inferior court erred in rendering judgment for the intervenors.

2. The court should have rendered judgment for the plaintiffs for all the property attached, and for all the property seized by plaintiffs under execution.

3. By the attachment against Sterrett, as garnishee, the plaintiffs acquired right to the effects in his hands.

4. By the seizure, under execution, the plaintiffs acquired exclusive right to the notes, &c., in the Orleans Bank, and should have been entitled, by the judgment of the court, to the entire fund.

C. M. Conrad, for the intervenors.

Bullard, J. delivered the opinion of the court.

This is an action against Kraft as drawer of a bill of exchange, which was duly protested for non-payment. The defendant being an absentee, process of attachment was sued out, and James R. Sterrett, an attorney at law, was made garnishee.

In answer to interrogatories, Sterrett says, "I have no money in my possession, or under my control, belonging to the defendant." He then goes on to state that he has sundry notes owing by different persons, but principally by H. C. Cammack & Co., which he enumerates and describes. To an interrogatory whether those effects in his hands were not placed there to be appropriated to the payment of the bill sued on, he answers in the negative. In a supplemental answer the garnishee, afterwards, says that at the time the answer was filed by him, he had entirely forgotten the acceptance by him of a draft of J. H. Kraft in liquidation, in favor of D. W. Briggs, Cashier, for three sevenths part of the claim of Kraft & Co., against M. De Lizardi & Co., (when collected) which had been placed in his hands for collection; which acceptance was made early in 1838. That the notes mentioned in the first instance, came into his hands after the suit against Lizardi & Co. had been discontinued by order of the plaintiffs' agent. It further appears

that, since the first answers, one of the notes amounting to \$1500 had been paid.

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It thus appears that Sterrett had, at the time the attachment was levied, nothing else belonging to the defendant, Kraft, and the evidence shows that a part of the original claim against Lizardi & Co., amounting to about \$14,000 had been received by him and paid over to Thomas Barrett, acting as the agent of Kraft.

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Why Sterrett did not pay to the bank in discharge of the obligation he had contracted, to pay over 3-7 of what he might collect from Lizardi & Co., to their Cashier, need not now be examined. It is clear he had no longer the fund in his hands at the time the attachment was levied, the fund no longer belonged to Kraft, whose direction to Barrett to receive it and the subsequent payment to him by Sterrett, suffice to show that it was no longer a sum of money due to Kraft, and consequently was not liable to attachment in the hands of Sterrett.

The sum paid over to Barrett, by the garnishee, under Kraft's instructions, was about three sevenths of the claim against Lizardi & Co.

The plaintiffs recovered a judgment for the amount of their demand, with an order that it be satisfied out of the effects attached in the case. Thereupon a fieri facias was issued and the notes mentioned in the answer of the garnishee were seized in his hands, amounting to \$17,900. This seizure appears to have been made on the 14th February, 1840, and on the 29th April the writ was returned, the sheriff stating that of the seizure nothing came into his hands and that no other property was found.

In the meantime, on the 17th March, the plaintiffs took a rule upon Sterrett, the garnishee, to show cause why he should not surrender the notes attached in his hands or, in default thereof, why judgment should not be rendered against him for the amount of the plaintiffs' demand.

In this state of the case the Planters and Merchants Bank, of Mobile, the present appellees, intervened. In their petition

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they represent that Kraft, the defendant, being indebted to them in a large amount, and having a claim against Lizardi & Co., in the hands of Sterrett, their attorney, for collection, gave them an order to their attorney to pay over to them three sevenths of the amount that might be collected; which order was duly presented and accepted prior to the attachment issued by the plaintiffs. They aver that subsequently to the assignment of that portion of the debt, Sterrett made an arrangement, whereby he agreed to discontinue the suit against Lizardi & Co., on receiving from them a certain part in money and the remainder in certain notes and bills receivable from Cammack & Co., who were also liable for the debt. That the notes attached are the same given by Cammack & Co., and that the petitioners are entitled to three sevenths thereof. They therefore ask to intervene and that they may be declared entitled to receive three sevenths of all sums or claims or evidences of debt which have been attached in the case.

An order on a garnishee to pay over a certain portion of a claim in money when collected, arising from certain notes in his hands, does not effect the notes, not yet collected. They still remain the property of the original owner, and are liable to attachment by any of his creditors.

The Commercial Court gave judgment in conformity to the prayer of the petition of the intervenors, and the original plaintiffs appealed.

We are of opinion that the court erred. The order on Sterrett was for a certain portion of the claim in money when collected. The notes received by Sterrett, from Cammack & Co., not yet collected, were not affected by that order, and still remained the property of Kraft. The draft on Sterrett cannot be regarded as a transfer of three sevenths of the claim against Lizardi & Co., but a direction how to dispose of the proceeds when collected. But even if it were to be considered as a transfer, it was imperfect as to third persons or creditors without notice to the debtor.

But there is another and stronger objection to the proceedings and judgment in favor of the intervenors. They do not sue as the creditors of Kraft, but of Sterrett. They do not allege a right of action against Kraft; nor do they ask a judgment against him. Their petition shows on the contrary that they took the draft, on Sterrett, in consideration of a pre-existing

debt, due by Kraft, but that draft was accepted and no new cause of action, as against Kraft, grew out of it. The case presented is then this,—a judgment creditor seizes upon notes and other evidences of debt, due to his debtor, and a person having no judgment interferes to prevent the sale of the property seized. He cannot be listened too unless he shows a judgment against the common debtor, or some title specifically to the property seized; and we have already said that, in our opinion, the notes attached were not affected by the order of Kraft on Sterrett; they remained the exclusive property of the former, liable to be attached by his creditors.

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It is therefore adjudged and decreed that the judgment of the Commercial Court be avoided and reversed; and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below; it is further ordered, that the intervention of the Planters and Merchants Bank be dismissed at their costs, and that the rule taken on the garnishee be made absolute, and that he pay over to the sheriff, for the benefit of the plaintiffs the sum of \$1500, received on one of the notes attached, and that he surrender the other notes mentioned in his answer and in the sheriff's return, to the sheriff to be disposed of for the plaintiffs, in discharge of their judgment, according to law, and that the appellees pay the costs of this appeal.

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STATE vs. JUDGE OF PROBATES IN NEW ORLEANS.

AN APPLICATION FOR A MANDAMUS.

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NEW ORLEANS.

A foreign will, or one made in another State, *duly proved* in a competent court where it is made, the executors appointed by the testator, may continue to act in this State, when the will has been registered in the Court of Probates where the property is situated.

So foreign wills or those made in other States, do not require the appointment of a dative testamentary executor and attorney for absent heirs, when ordered to be enregistered in this State. The executors or administrators appointed and qualified to act under the will in the place where it is probated, can act under it in relation to property here.

This is an application for a mandamus, commanding the Judge of Probates for the city and parish of New Orleans, to admit and order the will of Charles M'Manus, deceased, opened and probated in the State of Kentucky, to be enregistered and made executory here, without appointing a dative testamentary executor and attorney for absent heirs.

A rule was taken on the judge in this court to show cause why the mandamus should not issue as prayed for. The judge showed for cause the *reasons of his judgment* rendered in the case.

Peyton & Smith, for the applicants, made the following points :

1. The applicants exhibit the last will of the deceased, appointing them his executors, the proceedings admitting the will to probate, the swearing of the applicants as executors, the ordering of letters testamentary to issue to them, and the renunciation of the other executor. They are entitled to the benefit of articles 1681 and 1682 of the Louisiana Code. *State vs. Judge Bermudez, Estate of Ramage*, 13 La. Rep., 224; *Same vs. same, Estate of Sloan*, lately decided.

2. The articles of the Code of Practice cited by the judge refer only to successions opened in this State.

3. There is nothing to show the heirs are absent, and if they

were there is no law authorizing the judge to appoint an attorney for them in this case.

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4. The only property of the estate here is a debt due to the deceased on a promissory note, on which suit was brought by attachment and property has been attached. It is the case of M'Manus vs. West, decided by this court a few days since. No application for a dative executor is made, nor is there any creditor, heir or legatee of the deceased in this State.

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Simon, J. delivered the opinion of the court.

An application having been made to the Court of Probates by the testamentary executors of Charles M'Manus, for the registry and execution of the will of the deceased, with a prayer that the petitioners be recognized as the testamentary executors of the said will, and authorized to act in that capacity in this State; the judge of the said court ordered the said will to be registered and executed; and disregarding the last prayer of the applicants' petition, proceeded to appoint a dative testamentary executor, and an attorney to represent the absent heirs.

The petitioners, who reside in the State of Kentucky, where the will in question was received, proved and regularly admitted to probate, obtained from this court a rule on the judge of the Court of Probates, to show cause why he should not order said will to be registered and executed, and the petitioners to be recognized as the executors thereof, without appointing any dative testamentary executor or attorney to the absent heirs; which rule, after having been served on the said judge, was by him answered by referring us to his judgment in the following words: "The court considering from the annexed document that the will of the late Charles M'Manus has been duly proved before a competent judge of the place where it was received; that it is the imperious command of the law giver that an administrator under the will should be appointed by the court when the executor appointed by the testator will not or

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cannot perform the duties, or is *dead* or ABSENT; C. Pr., 924, sec. 7; that the executors appointed by the testator are *absent*, and considering further that the heirs of the deceased are absent and that in such a case the judge is bound by law to appoint an attorney to represent the absent heirs, and that this appointment is to be made at the opening of the succession; *La. Code*, 1204 to 1210; it is ordered, &c., &c."

This case is very similar to the one reported in 13 *La. Rep.*, 223, except that in the latter case, there was no application on the part of the executors to be recognized as such; and comes particularly within the rule established by a late decision of this court rendered in the matter of the testament of Jane Sloane, on a mandamus directed to the same judge. It appears however that his opinion is principally based on the *art. 924, sec. 7, of the Code of Practice*, which is in these words: "Courts of Probates have exclusive power to appoint administrators under the will, when the executor appointed by the testator, will not or cannot perform the duties, or is dead or ABSENT"; and he infers from this law that the petitioners being absent from the State of Louisiana, cannot be allowed to act here as testamentary executors to a will which is sought to be executed under the *arts. 1681 and 1682 of the La. Code*, which say: that "*testaments made in foreign countries and other States of the Union, cannot be carried into effect on property in this State, without being registered in the court within the jurisdiction of which the property is situated, and the execution thereof ordered by the judge;*" and that "*this order of execution shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent judge of the place where it was received. In the contrary case, the testament cannot be carried into effect, without its being first proved before the judge of whom the execution is demanded.*"

A foreign will, or one made in another State, duly proved in a competent court where it is made, the executors appointed by the testator, may continue to act in this

The opinion of the Judge of Probates seems to us erroneous: the articles above quoted do not prohibit the executors

appointed by the testator in a testament made in foreign countries and other States of the Union, from continuing to act as such in this State; and do not require the appointment of any dative testamentary executor or administrator under the will, to carry such foreign will into execution in relation to property situated in this country; they merely indicate the requisites under which our laws will permit the execution of such will in Louisiana; and surely, if the intention of the law giver had been such as it is contended for, our laws would have contained a special provision to that effect. We understand the *art. 924* of the Code of Practice, from its general context, to refer only to successions which are opened in this State, in which administrators or executors are to be confirmed or appointed here, and not as being in any manner applicable to the administrators of successions opened in a sister State or in a foreign country; such administrators, whatever be their denomination, deriving their authority from the laws of the country where they have been appointed, have a right to exercise the rights and duties appertaining to their trust, provided they comply with the requisites of the law of the place where the property is situated; and with regard to testamentary executors, provided they obtain here the confirmation of their authority, after the recording of the will, from one of our Courts of Probates; *Story, Conflict of Laws, No. 509.*

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State, when the will has been registered in the Court of Probates where the property is situated.

So foreign wills or those made in other States, do not require the appointment of a dative testamentary executor and attorney for absent heirs, when ordered to be enregistered in this State.— The executors or administrators appointed and qualified to act under the will in the place where it is probated, can act under it in relation to property here.

This is manifest from the doctrine repeatedly established in our jurisprudence; as, for example: under the *art. 351 of the La. Code*, we have held in the case of *Percy vs. Provan*, 15 *La. Rep.*, 74, that the tutor of a minor, who is in the State, and to whom therefore said tutor is to be appointed or confirmed here, cannot be permitted to reside in another country. Yet in the case of *Douglass vs. Edwards*, 9 *La. Rep.*, 237, this court said that a tutor legally appointed to a minor who is out of the State, according to the rules and forms of a foreign State or government, could, though an absentee, and without any confirmation by our tribunals, do all things here appertaining to the interest of the pupil, as if said tutor had received his

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appointment in pursuance of our laws. See also the case of *Berluchaux vs. Berluchaux*, 7 *La. Rep.*, 539, where a similar doctrine is entertained; and particularly in the case of *Chiapella vs. Couprey*, 8 *La. Rep.* 86, in which the point was fully investigated, and where this court held in establishing the difference between the rights of a foreign tutor and those of an administrator, that "in relation to the rights and duties appertaining to a testamentary executor or administrator of an inheritance or succession, they cannot be exercised in this State, under the probate of a will in a foreign State, and authority there granted to carry it into execution, *without causing the will to be here recorded, and obtaining authority from a competent tribunal to execute it*; and that an administrator by appointment in another State, is wholly without authority in this, to administer the property of a succession here situated, *unless he be authorized to act by a Court of Probates in this State.*" This is the very object of the application made by the petitioners to the Court of Probates; it is not contrary to our settled jurisprudence which seems to have already established the rule that when an executor appointed by a foreign will and confirmed as such in a foreign country, is willing to act here, he should be recognized as such and authorized to execute it in Louisiana; and in the language of this court in the case last quoted, "so long as foreigners are permitted to inherit property in this country, we are unable to perceive any good reason why impediments should be thrown in their way in a pursuit to recover and take possession of it, unless in a case where it is shown that the interests of our own citizens would probably suffer from its abstraction." This is also based upon the soundest principles of international law.

With regard to the appointment of an attorney to represent the absent heirs; we see no necessity for it in this case; the succession is not opened in this State, and there is no proof that there are any absent heirs; we have several times held that the existence of absent heirs is not to be presumed in all cases; 15 *La. Rep.*, 530.

We think therefore that the appointments made by the Judge of the Court of Probates of a dative testamentary executor to the last will of Charles M'Manus, and of an attorney to represent his absent heirs, not having been called for, are illegal; and that his decree, after ordering the registry and execution of the said will, ought to have been extended to recognizing the petitioners as the executors thereof, and to authorizing them to act as such.

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vs.
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Let the rule be made absolute.

BARKER vs. WHITNEY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

There is no particular form of notice of protest necessary, so that enough is stated to inform the parties to the bill, of their liability and put them on their guard.

Notice may be sent in two ways; one by the holder to all the parties to the bill; which will enure to the benefit of any endorser who shall pay it, in an action against his predecessors or the drawer, or the holder may notify his immediate endorser and the next, &c.; and one day is allowed to each party to deposit notice in the post-office, &c.

A party whose name is not on a bill, though interested in it, is not entitled to the benefit of the rule allowing each party a day to send notice to the party before him.

If the holder of a bill or note place it in the hands of his banker or agent with his name on it, the agent is only bound to give notice of its dishonor to his customer, and he to the party next entitled to notice.

But where a bill is protested and notice for the endorser sent to the third person, whose name is not on the bill, and he on the following day deposits it in the post-office to be sent to the endorser, the latter will be discharged by the delay.

This is an action on two bills of exchange of the following tenor:

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\$2000.

New Orleans, May 2d, 1839.

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WHITNEY.

"Sixty days after sight of this first of Exchange, second unpaid, pay Benjamin Whitney, or order, \$2000; value received, and charge the same to account of

GILLINGHAM & CO."

To L. H. GILLINGHAM,

"May 15, 1839.

Philadelphia. } "LEWIS H. GILLINGHAM."

Endorsed, "Pay A. Benson & Co."

B. WHITNEY.

"Without recourse to us."

"A. BENSON & CO."

This bill was protested, at maturity, at the request of the Commercial Bank of Philadelphia, on the 5th July, 1839, and notice thereof sent to Jacob Little & Co., New York; who transmitted the one for the defendant, to H. Bean of New Orleans, their agent. The other bill is in precisely the same situation, and judgment is prayed on both by Andrew S. Barker against the defendant, who is the endorser thereon.

The defendant's plea is want of due and proper notice.

There was judgment for the plaintiff and the defendant appealed.

Jacob Barker, for the plaintiff.

Lockett & Micou, for the defendant.

Garland, J. delivered the opinion of the court.

The plaintiff, as holder of two bills of exchange drawn by Gillingham & Co., of New Orleans, on L. H. Gillingham of Philadelphia, at sixty days sight, sues the defendant as the payee and endorser, claiming \$3,500 with interest and damages. The bills were accepted by L. H. Gillingham, the one for \$1500 falling due the 5th of July, 1839, and the other for \$2,000 the 17th of the same month. The bills were purchased by Horace Bean & Co., of New Orleans, for Jacob Little & Co., of New York. The name of this latter firm is not

on either of the bills. They are both endorsed, "pay A. Benson & Co., or order; B. Whitney;" and again endorsed by Benson & Co., without recourse. When the bills became due, they were held by the Commercial Bank of Pennsylvania and protested for non-payment at the instance of that corporation. The protests are in the usual form, stating the presentment, demand of payment, refusal to pay and protest. The Notary in his testimony says the notices to Gillingham & Co. were put in the post-office, in Philadelphia, on the days the bills were protested, directed to New Orleans. The notices to Whitney, the-endorser, whose residence he says was not marked on the bills or known to him, he enclosed on the same days to Little & Co., at New York, as directed. The notice on the first bill, is as follows:

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Philadelphia, July 5th, 1839.

Lewis H. Gillingham's acceptance of Gillingham & Co's draft or Bill of Exchange, in your favor, and by you endorsed, for 1500 dollars, being this day due and unpaid, is delivered to me for protest, by the Commercial Bank of Pennsylvania, and you will be looked to for payment, of which you hereby have notice.

To BENJAMIN WHITNEY.

EDWARD HURST,

Notary Public and Attorney at Law, No 38 Walnut Street.

The other notices, to both drawers and endorsers, are in the same form and words, except as to dates, sums and names. The notices for Whitney were sent, by Little & Co., to Horace Bean & Co., by whom they were delivered to Whitney on the 16th and 29th of July. It is in evidence that the mail of the 6th of July, 1839, from Philadelphia, arrived in New Orleans on the 14th, that of the 7th, on the 16th, that of the 17th on the 25th, that of the 18th on the 26th. The mail from New York of the 8th arrived on the 17th of July, and those of the 18th, 19th and 20th on the 29th of the same month. The evidence of the clerk of Gillingham & Co., establishes pretty

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clearly that they received the notices to them on the 14th and 26th of July, two days in one case and three in the other, previous to the endorser being notified. This was in consequence of the notices, for Whitney, being sent to New York instead of New Orleans.

Various questions are raised in relation to the protest, the form of the notice and other matters, but the opinion we entertain as to the sufficiency of the notice makes it unnecessary to examine any of the other points raised.

There is no particular form of notice of protest necessary, so that enough is stated to inform the parties to the bill, of their liability and put them on their guard.

Notice may be sent in two ways; one by the holder to all the parties to the bill; which will enure to the benefit of any endorser who shall pay it, in an action against his predecessors or the drawer; or the holder may notify his immediate endorser, and he the next, &c.; and one day is allowed to each party to deposit notice in the post-office, &c.

It is well settled that no particular form of notice is necessary, so that enough is stated to inform the parties to the bill of their liability and to put them on their guard. This notice the endorser must have sent to him to hold him responsible. It may be sent in two ways. One by the holder of the bill sending a notice to all the parties to it, which notice will enure to the benefit of any endorser who shall pay the bill, in an action against his predecessors or the drawer. The other is, by the holder giving notice to his immediate endorser and he to the next, and so on to the drawer. When this circuitous mode is adopted one day is allowed to each party to deposit the notice in the post-office, or send it by the ordinary conveyance. This mode the plaintiff claims to have the advantage of, and if the names of Jacob Little & Co. were on the bills, we should say without hesitation he would be entitled to the benefit of it. But we are of opinion this rule applies exclusively to the parties whose names appear on the paper. There is no evidence that the Commercial Bank of Pennsylvania was the agent of Little & Co., and that to show Benson & Co. were agents, is of the weakest character; and they had passed the bills by endorsements calculated to throw suspicion on them, which should have made any subsequent holder very cautious as to his proceedings. But supposing both Benson & Co. and the bank to have been the agents of Little & Co., they should, as prudent men, have informed them of the residence of Whitney, and if they did not know it, of the agents through whom the bills were purchased, so that notices might be sent direct. This, if

not absolutely requisite, would have been more just towards all parties.

We think the true rule is laid down in the case of *Flack vs. Green*; 3 Gill & Johnson's Reports of the decisions of the Supreme Court of Maryland, 474. That a person whose name is not on the bill, though interested in it, is not entitled to the benefit of the rule allowing each party a day to send the notice to the party before him. Much inconvenience, and we think serious difficulties would often arise, from allowing notices being sent through persons not parties to a bill, and it is easy to avoid them by requiring the names of all interested to appear.

If the holder of a bill or note, place it in the hands of his banker or agent, with his name on it, the banker or agent, is only bound to give notice of its dishonor to his customer, and he to the party next entitled to notice, or to him whom he wishes to hold liable.

Under such circumstances, the circuitous mode of giving notice would have high authority to sustain it; *Bayley on Bills*, Ed. 1826, p. 173, 174; 5 Mass. Rep., 167; 2 Johnson's Cases, 1.

But in a case where it is not shown that the holder of the bill at whose instance it was protested, was the agent or banker of the party claiming to be interested, the name of whom is not on the bills or on the record, in any manner, we do not feel authorized to relax the strict rule of law in relation to notice, in favor of a party who has taken the bill, since it was protested, with a full knowledge of all the circumstances, and without the endorsement of the party said to have so been interested.

The plaintiff insists strenuously on a promise to pay the bills after the notice of protest. We have examined the evidence in support of this claim, and do not think it is sufficient of itself to sustain the judgment of the Commercial Court.

Upon a full examination of the case, as it now stands before us, we do not think the plaintiff is entitled to recover.

The judgment of the Commercial Court is therefore annul-

EASTERN DIS.
May, 1841.

BARKER
vs.
WHITNEY.

A party whose name is not on the bill, though interested in it, is not entitled to the benefit of the rule allowing each party a day to send notice to the party before him.

If the holder of a bill or note place it in the hands of his banker or agent, with his name on it, the agent is only bound to give notice of its dishonor to his customer, and he to the party next entitled to notice.

But where a bill is protested and notice for the endorser sent to the third person, whose name is not on the bill, and he on the following day deposits it in the post-office to be sent to the endorser, the latter will be discharged by the delay.

EASTON Dis. led, avoided and reversed, and ours is one of non-suit against
May, 1841. the plaintiff with costs in both courts.

WOOSTER
vs.
EASTON.

WOOSTER vs. EASTON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY
OF NEW ORLEANS.

Judgment affirmed with damages as a delay case.

This is a suit against the maker of a note, to which there is no serious defence.

From judgment against him the defendant appealed.

I. W. Smith, for plaintiff, asked for the affirmance of the judgment with the maximum of damages.

Culbertson, contra.

Bullard, J. delivered the opinion of the court.

This is an action upon a promissory note by the payee against the drawer. No serious defence appears to have been made below and the appeal was evidently taken merely for delay.

It is therefore ordered that the judgment of the Parish Court be affirmed with costs and ten per cent. damages.

DUFOUR & CO. vs. MEFFRE.

EASTERN Dis.
May, 1841.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.**

**DUFOUR & CO.
vs.
MEFFRE.**

Judgment affirmed ; on the abandonment of part of the defence and admissions of the defendant.

This is an action by Dufour & Co., acting for the late firm of Dufour freres, on a promissory note signed by the firm of P. Parc   & Meffre  . Parc   having failed and only part of the note and debt being paid, this suit was instituted against the defendant as a separate partner.

There were some exceptions filed and a show of defence made at first, which vanished at the trial. But the defendant appealed from judgment against him.

Castera, for the plaintiffs.

Preaux, contra.

Simon, J. delivered the opinion of the court.

The facts of this case as admitted by both parties, show that the plaintiffs are clearly entitled to a judgment for the amount sued for. They seek to recover the balance of a debt formerly due by the commercial firm of Parc   & Meffre  , to Dufour freres. Parc   having failed after the dissolution of the partnership, the debt was carried on his schedule, and a part of it was paid by his insolvent estate, for which credit is allowed in the petition. The signatures to the notes sued on are admitted ; and it is also admitted that the plaintiffs are the liquidating partners of the firm of Dufour freres. No defence whatever is set up ; and the exceptions originally filed by the defendant seem to have been abandoned by the subsequent proceedings ; and the material ones cured by the admissions.

No reason has been shown and we are unable to discover any, why the judgment of the court below should be disturbed.

EASTERN Dis. It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.
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LAVIGNE
vs.
THEURER ET AL.

LAVIGNE vs. THEURER ET AL.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

Judgment affirmed with maximum of damages, as a delay case.

This is an action against the maker and endorser of a promissory note, to which there was no defence. After final judgment the defendants appealed.

There was no defence in this court.

Barthe, for the plaintiff, urged the affirmance of the judgment with ten per cent. damages.

Simon, J. delivered the opinion of the court.

This suit was brought on a promissory note of hand. The defendants having failed to answer a judgment by default was regularly taken and made final against them.

This appeal was clearly taken for delay, and the defendant must pay the damages prayed for by the appellee.

It is therefore ordered, adjudged and decreed that the judgment of the City Court be affirmed with costs; and with ten per cent. damages as for a frivolous appeal.

TOTTEN vs. MERRIFIELD.

EASTERN Dis.
May, 1841.

Appeal dismissed for want of means to examine the case.

TOTTEN
vs.
MERRIFIELD.

This is a suit against the defendant as one of the makers of a note signed Hodge & Merrifield.

There was an exception or plea of misnomer, that the defendant was sued as Andrew S. Merrifield when his name was Alden S. Merrifield. The plaintiff amended, made service of new citation and had judgment. The defendant appealed.

It appears all the evidence was not taken down.

Elmore & King, for the plaintiff.

C. M. Jones, contra.

Morphy, J. delivered the opinion of the court.

In this case there is neither statement of facts, nor bill of exceptions, nor assignment of errors, nor any other means afforded by which the correctness of the judgment and proceedings below can be tested.

The appeal is therefore dismissed with costs.

CASES IN THE SUPREME COURT

EASTERN DIS.
May, 1841.

GOESDEN, *vs.* MORRISON.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

GOESDEN
vs.
MORRISON.

Appeal for delay and judgment affirmed with the maximum of damages.

This is an action on a merchants' account for \$376 10, against J. Morrison & Co. J. Morrison excepted; and averred he never carried on business under the firm as alleged in the petition. He admits he was cited, but is doing business in his own name and cannot answer the plaintiff's petition. Time was given to answer in. On the merits he pleads the want of amicable demand, and that he did not owe all the account.

There was judgment against him and he appealed.

Kennedy, for the plaintiff.

Mace, contra.

Morphy, J. delivered the opinion of the court.

This suit is brought on an open account for goods, wares and merchandize sold and delivered to the defendant. Having brought up a record in which there is no statement of facts, bill of exception, or any other matter which will enable this court to examine his case on its merits; we believe that the appellant never contemplated a revision by this court of the judgment below; but sought only to retard its execution.

The judgment of the Commercial Court is therefore affirmed with costs and ten per cent. damages on the amount sued for.

RUSSELL vs. FAVIER ET AL.EASTERN Dis.
June, 1841.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

RUSSELL
vs.
FAVIER ET AL.

Where goods or property are *taken feloniously* no title is acquired by the felon, and he can convey none ; but if the vendor delivers possession with the intent not only that the *possession* but the *property shall pass*, a *bona fide* purchaser from the fraudulent vendee will hold the property. His equity is greater than that of the original owner.

But where the owner of a slave puts her on hire, with *no intention of passing the right of property* to the bailee or lessee, the subsequent bad faith of the lessee in selling the slave as his own, does not deprive the true owner of his property, or give title to an innocent purchaser.

This is a petitory action. The plaintiff alleges he is the owner of a female slave named Lydia, worth \$800, and which he shows to be in possession of the defendant, who refuses to deliver her up. He prays judgment for said slave and her hire at \$150 per annum.

The defendant, widow Favier, pleaded the general issue and set up several other matters in defence. She further averred she purchased the slave in contest from one Isaac Veill of Natchez, Mississippi, by notarial act passed in this city the 12th May, 1838, and paid \$530 in cash to her said vendor. She prays that he be called in warranty to defend this suit, and that she have judgment over against him for the price, and \$400 for hire, &c., in case she is evicted.

The warrantor pleaded the general issue and averred that he was the true and legal owner of the slave Lydia when he sold her to the defendant, having purchased her at public auction in Natchez, Mississippi, where slaves are considered as moveable property and title passes by delivery.

Upon these pleadings and issues the cause was tried.

The evidence fully established the fact that the plaintiff was the original owner of the slave and that he brought her with others from Virginia to Vicksburg in 1836, where they were hired out. One John D. Bruner hired this girl from Henderson, the agent of plaintiff, and in April, 1838, at Natchez, had her sold at public auction as his property and Isaac Veill be-

EASTERN DIS. came the purchaser, who brought her to the city of New Orleans and sold her to the defendant.
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RUSSELL
VS.
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The evidence establishing title to this slave in the plaintiff, there was judgment in his favor for her, with \$6 per month damages from judicial demand until possession is delivered; and that the defendant have judgment against Veill, her warrantor, for \$530 and like damages.

Peyton, for the plaintiff, urged the following points in support of the judgment:

1. This is a bailment, or contract of hire in daily use, in which the bailee is bound to return the article or slave, according to contract; 2 Kent's Com., 585-6; Story on Bailment, 261-2; Pothier Louage, ch. 1, sec. 3; showing the difference between a *sale* and a hiring.

2. The bailor or bailee may maintain an action; 2. Bl. Com. 453. The bailee cannot dispose of property so as to divest the true owner of his right. In support of this position see two cases in Tenn. Rep.; one Stump vs. Roberts, Cook's Rep., 350. It was a case of hiring or loaning a horse, which was sold and the owner recovered him. See Holman's Digest, 55, title bailment; also, Yerger's Rep., 301, Haley vs. Bowman, which is the same in principle and refers to 1 Chitty's Pleadings, 120-1; 1 Washington's Rep., 12, &c.; even an action of *detinue will lie* after the property is out of defendant's possession; Devereux's N. C. Rep., vol. 1, 466. See Story on Bailments, 261-2, as to the rights and duties of the hirer.

3. The cases in 8 Cowan, 340; 14 Wendell, 32, and 22 idem, 308, all go on the principle that the owner had by an *absolute sale* agreed to part with *both possession and property*, and thereby agreed to trust the purchaser and enable him to impose upon others. In this case the plaintiff did no such thing. Veill was at least very negligent in not requiring the production of a title by Bruner, and his hasty removal of the slave from the State of Mississippi looked suspicious; and as he is to pay the judgment against the defendant, justice is done on all sides.

Hoa, for the defendant, insisted that she held the slaves in question by a good title and should be maintained in her possession as the true owner.

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Benjamin, for the warrantor contended :

1. The evidence shows that in Mississippi slaves are moveables : that the plaintiff delivered *possession* of the slave sued for, to the vendor of the warrantor ; that Veill, the warrantor, bought the slave at public auction.

2. A purchaser of *moveable* effects at public auction, who buys *bonâ fide* from an individual to whom the real owner has intrusted the *possession*, acquires a good title even though the owner had given the *possession* without authority to sell—or in other words, *possession* is such proof of *title* to moveables as to enable the possessor to convey a good title to *bonâ fide* purchasers in the ordinary course of business, unless the *possession* has been *feloniously* obtained ; 8 Cowen, 240 ; Andrew vs. Dieterich, 14 Wendell, 32 ; Hoffman vs. Carow, 22 Wendell, 308 and seq.

3. The distinction is this : if possession be obtained *feloniously*, as by *theft*, the possessor can pass no title ; but if obtained *fraudulently*, it suffices to enable him to pass title to third persons. See cases above cited.

4. The judge below certainly erred in condemning the warrantor to pay for the hire of the slave whilst in possession of Mrs. Favier ; she has enjoyed the services, and if it be decided that she is not entitled to them, she must pay their value : the warrantor has enjoyed the price, and cannot be bound to pay more than the interest thereon.

Garland, J. delivered the opinion of the court.

The plaintiff claims a negro girl as his property, which he alleges is in the possession of the defendant Madame Favier, who sets up title to her. The latter denies the plaintiff has any right to the slave, and further says she purchased her in good faith for a valuable consideration of Veill, who warranted the

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title, and he was cited to defend it. He answers, that he purchased the slave for a valuable consideration and in good faith; he denies defendant's title, and says, if he ever had any, it has been divested.

The evidence establishes conclusively, that the girl Lydia was born on the plantation of the plaintiff in the State of Virginia, of a female slave that belonged to him. In the latter part of the year 1836, he brought this girl with a number of other slaves to Vicksburg, in the State of Mississippi, for the purpose of hiring them out. He refused to sell them, though offered a high price. The slaves were hired out at the commencement of each year, and the plaintiff annually visited the State for the purpose of receiving their hire. He had an agent in Vicksburg, who attended to his business in his absence. In January, 1838, the girl was hired to one J. D. Bruner, who in the month of April following took her to Natchez, and after offering her for sale privately at different times, finally had her sold at auction, when Veill became the purchaser, brought her to New Orleans, and sold her to the defendant, with a full guaranty, without notice of any fraud.

The counsel for Veill, the warrantor, rests his defence principally on the ground, that slaves are, by the law of Mississippi, moveable property, that possession is prima facie evidence of title, and as it is proved that Bruner came lawfully into the possession of the slave by hiring her, his subsequent bad faith and fraudulent conduct towards the real owner, ought not to affect the property in the hands of an innocent purchaser for a valuable consideration. He has called our attention to the distinction between the felonious and fraudulent acquisition of property, and the difference it makes in the rights of a third person, and from the earnestness with which he pressed on us the opinion of one of the dissenting members of the Court of Errors in New York, in the case of Hoffman vs. Carow, 22 Wendell, 285, it would seem he was desirous of abolishing that distinction.

Upon a full examination of all the cases and principles

settled in the United States and other countries, we think the correct doctrine has been laid down by chief justice Savage, in the case of Andrew vs. Dieterich, 14 Wendell, 34. He says, if goods are taken *feloniously*, no title is acquired by the felon, and he can convey none to a *bona fide* purchaser; but where the vendor has delivered possession of his goods, with the intent not only that the *possession*, but the *property* shall pass, a *bona fide* purchaser from a fraudulent vendee, shall hold the goods in preference to the original owner. The reason is, that the original owner, by putting his goods in the hands of the fraudulent vendee, has reposed confidence in him, and has enabled him to commit a fraud; therefore the equity of the original owner is not equal to that of the person who has *bona fide* parted with his money or property in the purchase of such goods. The original vendor, by his imprudence, enabled the fraudulent vendee to defraud some one, and should himself be the sufferer rather than a third person, who must otherwise be defrauded. 8 Cowen, 238; 5 T. R. 175; 13 Wendell, 570.

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Where goods or property are taken *feloniously*, no title is acquired by the felon, and he can convey none; but if the vendor delivers possession with the intent not only that the *possession* but the *property* shall pass, a *bona fide* purchaser from the fraudulent vendee will hold the property. His equity is greater than that of the original owner.

In this case it is evident, that Russell had no intention of passing the *right of property* in the slave in controversy to Bruner, by hiring her to him. He only intended to give a temporary possession, and the subsequent bad faith of the lessee does not deprive the owner of his right of property.

But where the owner of a slave puts her on hire, with no intention of passing the *right of property* to the bailee or lessee, the subsequent bad faith of the lessee in selling the slave as his own, does not deprive the true owner of his property, or give title to an innocent purchaser.

The La. Code, Art. 3475, says, that a possession of a moveable property for three years, which had been bought at auction or of a person in the habit of selling such things, will enable the possessor to hold it against the real owner, unless he return the price the possessor gave for it, but this rule, we apprehend, is not applicable to slaves.

The case of Barfield vs. Hewlett, 4 La. Rep., 120, is very similar to this. In that case the plaintiff established his title; it was admitted the defendant had purchased the slaves at auction, and took Harrauldson's bill of sale. The slaves had been delivered to Harrauldson in Tennessee, to be taken to Attakapas or Opelousas, with written instructions to hire them out. Harrauldson brought them to New Orleans, where he publicly

EASTERN DIS. offered them for sale, and finally put them up at auction. The
June, 1841. court said, it is clear the defendant acquired no title, his vendor

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having none himself, nor authority to convey any.

The judgment of the District Court is therefore affirmed so far as it relates to the plaintiff Russell and the defendant Madame Favier; but in relation to the portion of it between the defendant and Veill, her warrantor, it is ordered that said judgment be amended so, that she recover of him five hundred and thirty dollars, with interest at the rate of five per centum per annum, from the 2d of February, in the year 1839, until paid, and the costs of this suit and the costs of this appeal.

GUERIN'S HEIRS *vs.* BAGNERIES.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Heirship may be proved by parol evidence, when it does not appear, or is not shown, there was a register of marriages, births and deaths in existence. The latter will not be presumed, as it must be positively proved, that such register does exist.

Parol evidence will be received to identify a slave which was inherited by the plaintiff's mother from her father's estate, and to show her *possession* of said slave as part of the inheritance.

So parol evidence is admissible to *identify property* of a succession, accepted by an heir after having shown his right to inherit; or to identify slaves born on a plantation when the owner possesses by no written title.

Where the purchaser under execution is evicted, he is entitled to judgment over against the *seized debtor* and *seizing creditor*, on his warranty, but under article 711 of the Code of Practice, he *must first take out his execution* against the former and on the return of *nulla bona*, may proceed against the latter.

This is a petitory action. The plaintiffs who are the children and heirs of the late Madame Guerin, formerly Marguerite

Chauvin Delery, now deceased, sue to recover a female slave named Celestine and her daughter Fanny, which they allege they inherited from their deceased mother, and which are in the possession and claimed by the defendant Bagneries. He sets up title to said slaves under a marshal's sale, made in pursuance of a judgment and execution in favor of A. & J. Dennistoun & Co. against Louis Guerin, the husband of the plaintiffs' ancestor. *See the case in 13 La. Reports, 14.*

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On the return of the cause to the Parish Court for further proceedings, the plaintiffs made proof of their capacity as heirs of their deceased mother, and proved by witnesses the identity of the slave Celestine and her child named Fanny. They also showed by parol evidence that Celestine had been given to their mother by her father François Chauvin Delery, on her marriage with Louis Guerin, who retained possession of said slaves until her death. Afterwards being found in the possession of Louis Guerin, they were seized and sold in execution by the U. States marshal, which issued on a judgment obtained against said Guerin by A. & J. Dennistoun & Co. and the defendant became the purchaser. All this testimony was objected to as inadmissible as not the highest and best evidence of which the case was susceptible.

Dennistoun & Co. and L. Guerin were cited in warranty by the defendant.

There was judgment in favor of the plaintiffs decreeing them the slaves claimed, and costs of suit; and also in favor of the defendant Bagneries over against the members of the firm of Dennistoun & Co. *in solido*, in their warranty for the sum of \$1300, as the price at which said slaves were adjudicated by the marshal to the defendant, on the 18th October, 1834, with 5 per cent. interest from said date until paid; and finally that they have alike judgment over against Louis Guerin, also their warrantor. The defendant and warrantors all appealed.

Preston, for the plaintiffs, insisted on the affirmance of the judgment.

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Canon, for the defendant, contended that under article 44 of the Code of Practice, the plaintiffs had failed to make out such a title to the slaves in question as would authorize a recovery in a petitory action.

2. If, however the plaintiffs should succeed in evicting the defendant, he is entitled to judgment over against both plaintiffs and defendant in the execution under which the slaves were seized, sold and purchased. *C. Pr. art. 711.*

Th. Skidell, for the warrantors, Dennistoun & Co., insisted that the plaintiffs had not made out such a case as would entitle them to recover against a title derived from the marshal's sale. *C. Pr. 44.*

2. He maintained that parol testimony was improperly admitted to prove the heirship of the plaintiffs and of their claim to said slaves by inheritance; and the will of their grandfather from whom their mother is said to have received the slave *Celestine*, does not recite or make mention of any such slave, and this defect cannot be shown by parol testimony. There is also a discrepancy between the written and parol proof in relation to the plaintiffs' claim.

3. The judgment is erroneous as regards the warrantors under the article 711 of the Code of Practice, and should be corrected and made conformable to it.

Simon, J. delivered the opinion of the court.

This case having been remanded for further proceedings, see 13 La. Rep., 17; the lower court, according to the instructions of this court, permitted the plaintiffs to introduce parol evidence, to prove the execution of the act of settlement of the estate of François Chauvin Delery, and to show that the slave *Celestine*, by them claimed, is the same that was inherited by the plaintiffs' mother from her father. The defendant took a bill of exceptions, and judgment having been rendered in favor of said plaintiffs, said defendant and his warrantors appealed.

The additional evidence adduced before the inferior court,

establishes that the act of settlement was executed on the first of July, 1823 (day of its date), that the slave Celestine claimed by plaintiffs, is the same that was given to their mother by her father at the time of her marriage with Louis Guérin; that said slave was then 12 or 14 years old; that plaintiffs' mother got possession of said slave in 1810, and kept her in her said possession until her death. That the plaintiffs are her heirs. That Celestine remained in the possession of Louis Guérin and of the heirs of his deceased wife until said Louis Guérin failed; and that said slave has a child named Fanny. It is also shown that Celestine is the same slave that was sold by the marshal of the United States; and is the same one valued in the act of settlement at \$600.

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This cause is now before us on its real merits, and we shall therefore proceed to examine all the various grounds upon which the defendant and his warrantors attempt to resist the plaintiffs' claim, and endeavor to maintain the title which was transferred to the said defendant by the adjudication made to him by the marshal of the United States. They contend :

1. That there is no competent proof of the heirship of the plaintiffs; as the only proper and legal proof of such heirship is the mortuary proceedings of their deceased parent.

2. That parol evidence was improperly admitted of the slaves in question, having been donated to plaintiffs' mother, inasmuch as the will of François Chauvin Delery does not recite the names of any of the slaves therein stated to have been formerly given.

3. That François Chauvin Delery, by his will, mentions eight children as his heirs and universal legatees, whilst only seven are recited in the act of partition or settlement of his succession.

4. That all the heirs and parties to the act of partition, whose names are therein recited, did not sign it.

5. That said act is an act under private signature, which never was registered according to law; and is not valid against *bona fide* purchasers and creditors.

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BAGNERIES.

6. That the plaintiffs have not made out their title to the slave *Celestine*; and that the identity of the slave *Fanny* is not satisfactorily established.

Heirship may be proved by parol evidence, when it does not appear, or is not shown, there was a register of marriages, births and deaths in existence. The latter will not be presumed, as it must be positively proved, that such register does exist.

Parol evidence will be received to identify a slave which was inherited by the plaintiffs' mother from her father's estate, and to show her possession of said slave as part of the inheritance.

I. The testimony introduced to prove the heirship of the plaintiffs was not objected to in the court below; and although it is true that the registers of marriages, births and deaths are higher and more proper evidence than proof by witnesses, yet the existence of the former will not be presumed, as it must be positively proved that such registers or other proceedings do exist. 11 *Martin*, 718; 8 *Martin*, N. S., 269.

II. This is one of the legal points which were the subject of the decision of this court reported in 13 *La. Rep.* 17; and we fully concur in the opinion then pronounced. It is obvious that the parol evidence complained of does not go to establish a title or a donation by parol, but merely to identify a slave which was inherited by plaintiffs' mother from her father's estate, and to show the fact of said slave's having been put in her possession and kept by her as part of the inheritance. Such fact is independent of the act of partition and settlement which was subsequently passed between the heirs, as her said possession was far anterior to the execution of the said act, and commenced in 1810, at the time of her marriage with the plaintiffs' father, who, after her death, became their tutor and never had in himself any right or title to the property in dispute. It is true, that the will of François Chauvin Delery recognizes that he gave a female slave, valued at \$600, to each of his married children, in advance of their shares in his succession, *en avancement d'hoirie*, and that those slaves are not named in the said will; but this does not constitute the real and only title under which the plaintiffs are entitled to claim the slaves in question; it is on their *right of inheritance* in representation of their deceased mother, to whom the slave *Celestine* was delivered by her father in advance of her rights to his future succession, that their title is based, and in such a case, we understand that proof of the right to inherit, and of the identity of the property inherited, is all that can be required to show that

the title of the author is vested in the heir. 12 *Martin*, 649. EASTERN DIS. June, 1841.
 Indeed, it may often happen, that an individual who is legally GUERIN'S HEIRS vs. BAGNERIES.
 called to the succession of another, accepts it absolutely, and puts himself in possession of the property thus inherited; without being able to show any other written proof of his title but the *ex parte* inventory which he has caused to be made; and in such a case, if no inventory has been made (this is not necessary in all cases), how could he show his title to such or such specific property, if he was not to be allowed to prove by parol, after having established his right to inherit, the identity of the property inherited? In the case of slaves born on a plantation, how could the owner prove his title to them in any other manner but by parol, that is to say, by identifying such slaves as being born in his possession? We think the defendant has carried his objection too far: the rule is that all sales (every transfer) of immoveable property and slaves must be in writing; *La. Code, Arts. 2255, 2415*; and that parol proof of ownership or title to such property cannot be admitted, unless the object of the evidence is *to establish possession and that the plaintiff acquired the property by inheritance*. It is clear then, that the rule is not applicable to the present case, and that the right of the plaintiffs to the slaves by them claimed being founded on their right of inheritance, the evidence by them offered was legally admissible. The circumstance of there being a will and an act of partition, in which the slave is not named, cannot affect their right of recovery, as without those acts, the plaintiffs would not be precluded from establishing the same facts.

So parol evidence is admissible to identify property of a succession, accepted by an heir after having shown his right to inherit; or to identify slaves born on a plantation when the owner possesses by no written title.

III. The defendant ought to have shown, that the eight children mentioned in the will, were in existence at the time of the death of the plaintiffs' ancestor, in order to establish this point.

IV. The view we have taken of the second ground, renders the examination of this question unnecessary: the act of partition or settlement objected to, cannot add anything to the plaintiffs' right, nor can it affect it: it serves only to show

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that the plaintiffs have, by collation, accounted to their co-heirs for the value of the slave inherited by their mother.

V. The *Art. 2242* of the *La. Code* is not applicable to this case: the defendants cannot pretend to be creditors of the plaintiffs' ancestor, nor can they maintain to have purchased the slaves in question from the same person and under the same title. Moreover the plaintiffs and their mother had been in possession of said slaves since 1810, at which time Celestine was really delivered to their said mother; whilst the act complained of was only executed in 1823.

VI. From the evidence adduced by the plaintiffs, we are of opinion that they have completely made out their case, and that the slave Fanny has been satisfactorily identified to be the child of the female slave Celestine.

With regard to the judgment rendered by the lower court in favor of the defendant Bagneries against his warrantors, we think it is correct, except that the interest on the amount of said judgment should run from the 27th of November, 1834, and not from the 18th of October previous, and that instead of ordering the said amount to be first recovered of the creditors, said judgment should have been in conformity with the *711th Article of the Code of Practice*, to wit: "if the purchaser has been evicted from the thing adjudged to him, on the ground

Where the purchaser under execution is evicted, he is entitled to judgment over against the seized debtor and seizing creditor, on his warranty, but under article 711 of the Code of Practice, he must first take out his execution against the former and on the return of *nulla bona*, may proceed against the latter.

that *it belongs to another person* than the party in whose hands it was taken, he shall in that case have his recourse for reimbursement against the *seized debtor* and the *seizing creditor*; but upon the judgment obtained jointly for that purpose, the purchaser *shall first take execution* against the debtor, and *upon the return* of such execution, *no property found*, then he shall be at liberty to take out execution against the creditor." It is thus perfectly clear, that the defendant must first proceed against Louis Guérin, and that he cannot take out his execution against Dennistoun & Co., until from the return of the first writ it is ascertained, that no property has been found to satisfy the claim.

It is therefore ordered, adjudged and decreed that the judg-

ment of the Parish Court be affirmed with costs, with this modification : that Zénon Bagneries do recover of Louis Guérin, Alexander Dennistoun, John Dennistoun, William Wood, Robert Dick, William Craig Mylne, and Murray Mercies Thompson, *in solido*, the last named six persons composing the firm of A. & J. Dennistoun & Co., the sum of thirteen hundred dollars, with five per cent. interest per annum thereon from the 27th of November, 1834, until paid, and the costs of this suit in the lower court only ; and that the execution of this judgment be stayed as against A. & J. Dennistonn & Co., until the return of the execution, which is first to be issued by said defendant against Louis Guérin according to law ; the costs in this court to be borne by the defendant.

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BOWMAN vs. WARE.*

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a redhibitory action for the rescission of the sale and refunding the price, an offer to return the slaves, is sufficient if it be rejected ; as there is then no necessity of making an actual tender.

Where a bill of exceptions taken to the charge of the judge to the jury, does not state any specific proposition on which the charge was predicated and objected to, this court will assume that the judge *a quo* did his duty.

This is a redhibitory action to rescind the sale of a negro woman and her two small children on the ground of redhibitory defects and diseases in the woman, and to recover back the price paid. The plaintiff, Mrs. Bowman, alleges she purchased said slaves for the price of \$1800, shortly after they had been brought from Mississippi by the defendant, and she has

* JUDGE GARLAND did not join in this opinion, being related to the original owner of the slaves.

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discovered that the woman is afflicted with chronic rheumatism in the ancles and wrists to such a degree as to render her perfectly useless; and especially so inconvenient and worthless that had she known it, she would not have purchased. She alleges she has tendered said slaves back again to said Ware on condition of refunding the price, and is now ready to deliver them up, but that he refuses to comply with her request. She prays that said sale be rescinded, the price refunded, and the defendant decreed to pay damages.

The defendant pleaded the general issue.

The cause was submitted to a jury on a mass of evidence taken in relation to the existence of the redhibitory defects alleged.

There was also evidence of an *offer* made by the plaintiff through an agent to the defendant to take back the slaves in question and refund the price, which he declined; observing that he was acting for the original owner who resided in Mississippi.

There was a verdict and judgment rescinding the sale, and for the return of the price paid for said slaves, and the defendant appealed.

Potts, for the plaintiff urged the affirmance of the judgment.

C. M. Jones, for the defendant, contended that the plaintiff could not recover, because there was not such a tender of the slaves made in writing with notice, as is required by law, which is a condition precedent in an action for the rescission of a sale. *Janin vs. Franklin*, 4 La. Rep., 198; *Pothier on Ob.*, part 3, ch. 1, art. 8, *de la consignation, &c.*; *C. Pr.*, arts. 404 to 418.

2. The judge *a quo* erred in refusing to instruct the jury on the subject of a *tender* in such cases as this, and in acting as he did.

3. The verdict of the jury is not supported by the evidence.

and is not entitled to much weight in this case, as nearly all the evidence was taken by written depositions.

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Martin, J. delivered the opinion of the court.

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The defendant is appellant from a judgment in a redhibitory action, setting aside the sale of a female slave and her two children.

The defence in this court, relates to the want of a *tender* of the slaves. The petitioner alleges that she tendered said slaves back to the defendant on condition of refunding the price, and is now ready to deliver them back on the terms aforesaid. This is certainly a sufficient allegation. A witness has sworn that at the request of the plaintiff he called on the defendant and stated to him the defects in the slave, of which she complained; and further stated to him that she would not keep the slaves, but insisted on returning them and rescinding the contract. The defendant said he could not do this, as he was acting for a person in Mississippi; but that he would give other slaves in exchange at certain prices, which the plaintiff declined.

At the trial the plaintiff's counsel entered on the minutes of the court and prayed that it be made a matter of record, that "he then tendered a *re-conveyance* of the slaves in question, together with an offer to pay all costs up to that time." This was refused by the defendant's counsel, as it should have been made before the institution of the suit.

We are of opinion that the testimony fully establishes the allegations of the petition, so far as it became necessary to support a redhibitory action. In the case of *Janin vs. Franklin*, 4 La. Reports, 198, the judge who was then the organ of this court, said, that "until the vendee *offers* to return the slave, he cannot have an action for the price." When the vendor *rejects* the *offer*, there is no necessity of bringing the slave, and making an actual tender to him. This would be always useless, and very often extremely inconvenient. The vendor and vendee of the slave may be at a great distance from

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each other. The former cannot say that no opportunity has been afforded to him to accept what he had declared his unwillingness or inability to receive. In the present case the vendor declared that he was acting for a person who resided in another State; that he had other slaves which he would give in exchange at a certain price; but that he should not rescind the contract. On this, it appears to us, the plaintiff might well institute her action.

When the case came on for trial, the plaintiff's counsel *ex abundanti cautela*, made what is called a *tender* to the adverse counsel, which he refused. It does not appear necessary to express any opinion on this matter.

Where a bill of exceptions taken to the charge of the judge to the jury, does not state any specific proposition on which the charge was predicated and objected to, this court will assume that the judge *a quo* did his duty.

Our attention has been called to a bill of exceptions taken by the defendant's counsel to the refusal of the District Judge to instruct the jury, or give certain charges in relation to the question before them. As the bill of exceptions does not state any specific proposition, on which the instructions or charges required, were predicated, we are unable to test the correctness of the decision of the judge *a quo* in refusing them. We must therefore assume that he did his duty.

On the merits, the case was tried by a jury; and their verdict is clearly supported by the evidence before them and ought not to be disturbed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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2. The restriction in the charter confines the re-appointment and re-election to two thirds of the former board; and directors formerly appointed by the governor and left out, are ineligible to come in as new members, elected by the stockholders. *ib.*
3. If a director is *ejected as ineligible*, the next highest on the list voted for but left out, is not entitled to his seat. A new election must take place..... *ib.*

BATTURE.

1. The right to future alluvial formation or batture is a vested right inherent in the property itself, and forms an essential attribute of it; resulting from natural law in consequence of the local situation of the land to which it attaches.

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2. Cities may acquire *jure alluvionis*, but it must be as owner of the front, or as riparian proprietor; for the alluvion is but an accessory to the principal estate or land..... *ib.*

3. There is nothing in the Roman law which restricts the right of alluvion to particular localities or portions of land, having particular names; but the right depends on the question whether the land had fixed and invariable limits, or a natural boundary on one side by a water course..... *ib.*

4. The Jesuits' plantation out of which the *locus in quo* arises was originally entitled to the alluvion or batture in its front. The mere act of incorporation of the city in 1805, changing the name of this property from *rural* to *urban*, neither made the city a front proprietor so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion..... *ib.*

5. The onus or burden consequent on the right of alluvion is natural, not civil; it is a risk arising from the exposed situation of the land, not the expense of making embankments; for the right of alluvion exists on streams which do not overflow..... *ib.*

6. The public, through the agency of the corporation, has the sole use of the levee and bank of the river; and the front proprietor cannot extend the levee without the consent of the corporation, which in the meantime has the right to make all improvements for rendering it useful to the public and favorable to commerce..... *ib.*

7. The French government in laying out the ancient city of New-Orleans, left an open space between the front row of houses and the river, marked *quai* on the plan, which was a dedication of this space to public use, and it became thereby a *locus publicus*..... *ib.*

8. If in laying out the faubourgs, the ancient proprietors of those riparian estates had left an open space between the front street and the river, marking it as a public place on the plan, it would have amounted to a dedication if accepted by the public..... *ib.*

9. But none of the plans show any indication of Madame Delord and her vendees, having ever dedicated the front of her property on the river to public use; on the contrary, she continued to exercise acts of ownership as a riparian proprietor, and was required by the city ordinances of 1830 to keep up the levee in front as such..... *ib.*

10. *Garland, J.* The right of alluvion is not based exclusively on the principle of being subject to the expense and burden of keeping up roads and levees. The Roman Jurists say it is a mode of acquiring property by natural law; that it is just, the advantages of the thing should belong to him who

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11. The plan of Madame Delord, leaving an open space between new levee street and the river, was not a dedication of this space to public use. There was nothing marked or written on it indicating an *intention* so to dedicate it. . . . *ib.*
12. There is no particular form necessary to a dedication of land to public use. But it requires the assent of the owner and the fact of its being used for the purposes intended. *ib.*
13. *Martin, J. dissenting.* Where the plan of a city or faubourg fronting on a navigable river or the sea, has an open space between the front row of houses, or street, and the water, it becomes part of the port; and it is a *locus publicus*, dedicated to public uses, without any other designation whatever. *ib.*
14. The batture which formed in front of the faubourgs of the city of New-Orleans, after their incorporation with the city, became the property of the city and not of the front proprietors. *ib.*
15. In countries governed by the civil law, the ports or landing places of cities situated on navigable rivers, lakes or the sea, are *loci publici* in which individuals have no right of property. *ib.*
16. The plans of faubourgs Delord and Saulet, laying off these plantations into city lots and squares divested the owners of all interest, except in the lots and squares sold to individuals, &c. All the rest was dedicated to the public. The land or space between new levee street and the river became a *locus publicus* destined to the *public use*. The dedication required no further evidence than the plan and the *use* of these places by the public. *ib.*
17. The use of the batture outside of the levee is vested in the public, but the ownership or title to the soil is vested in the front proprietors of lots, or land to which the batture attaches or forms. . . . *Pulley & Erwin vs. Municipality No. 2,* 298
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BILLS AND NOTES.

1. The holders of a negotiable note receiving it without any notice of the conditions and equities between the original parties, and having paid a full consideration therefor, they will recover notwithstanding it was given to the payees on certain conditions not then fulfilled.
- Van Pelt & Fowler vs. Eagle Insurance Company et al.* 64
2. The endorser of a note has no right to enquire whether the plaintiff, in whom the legal title appears, was the agent or real owner, unless by a fictitious assignment he is about to be deprived of his defence against the true owner.
- Mitaine vs. Ferguson.* 92
3. The endorsee or holder of a note who takes it after maturity, holds it sub-

jeet to all the equities existing between the original parties.

Stetson vs. Stackhouse. 119

4. So where S. makes his accommodation note to D. to enable him to raise funds with an understanding that the latter was to pay it, if he used it; and he passed it to the plaintiff *after it was due*, in his action to recover of the maker he was non-suited..... *ib.*

5. The *promise* to endorse a note made payable to the defendant, proved by parol evidence, is sufficient to authorize a recovery, although he refused to put his name to it..... *Leeds vs. Bozeman.* 117

6. Where the pleadings charge the plaintiff with fraud and collusion as the holder of a note; and the evidence shows its extinguishment by payment, he is bound to prove he gave a valuable consideration for it before maturity, without any knowledge of what had passed, or he cannot recover.

Moffatt vs. Murray et al. 357

7. Where the defendants, sued as drawers of a draft, plead the want of due notice, but admit it was for accommodation and one of them offered to give endorsed notes in payment: *Held*, that the *onus probandi* of their having funds in the hands of the drawees, devolved on them.

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10. Where the testimony is insufficient to show clearly that the note endorsed by defendant was altered after its execution, by adding the words payable at the "Union Bank" he cannot exonerate himself from his endorsement.

Oakey & Co. vs. Hennen. 435

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Hall vs. Gaiennie et al. 442

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15. Where the drawers of a bill depend for its being honored on the proceeds of a claim against the drawee, then in litigation, and take a receipt that it shall not be protested in case of dishonor, to save costs; they will not be considered as having funds in the hands of the drawee so as to entitle them to notice.

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16. There is no particular form of notice of protest necessary, so that enough is stated to inform the parties to the bill of their liability and put them on their guard *Barker vs. Whitney*. 575

17. Notice may be sent in two ways; one by the holder to all the other parties to the bill, which will ensure to the benefit of any endorser who pays it, in an action against his predecessors or the drawer; or the holder may notify his immediate endorser, and the next, &c.; and one day is allowed to each party to deposit notice in the post-office, &c..... *ib.*

18. A party whose name is not on a bill though interested in it, is not entitled to the benefit of the rule allowing each party a day to send notice to the party before him..... *ib.*

19. If the holder of a bill or note place it in the hands of his banker or agent with his name on it, the agent is only bound to give notice of the dishonor to his customer, and he to the party next entitled to notice..... *ib.*

20. But where a bill is protested and notice for the endorser sent to the third person whose name is not on the bill, and he on the following day deposits it in the post-office to be sent to the endorser, the latter will be discharged..... *ib.*

CLERKS.

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COMMISSION MERCHANT.

1. Where the plaintiff as agent or commission merchant agreed to furnish freight on a vessel at a certain rate and 5 per cent. primage thereon, and the freight was not received as agreed on; but the Captain made a new contract for freight to which the plaintiff was not a party: Held, that the latter cannot charge for the freight..... *Laidlaw vs. Tyson*. 378

2. The consignee of a vessel inward is not entitled to charge commission on the outward cargo as a customary charge unless he actually obtains an increased freight..... *Tyson vs. Laidlaw*. 380

COMMUNITY.

1. Property purchased under the husband's own judgment becomes part of

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COMPENSATION OF DEBTS.

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2. Where a creditor takes goods of his supposed debtor in his absence and sells them at a sacrifice, he is chargeable with them at the *price they are charged* at by the consignor. *Staunton vs. Cox's Syndic.* 508

3. Where a party declines a compliance with his part of the contract, the institution of suit, claiming performance of the contract or damages in the alternative is a sufficient putting of the defendant *in morâ*, if any was necessary.
New Orleans & Nashville Rail Road Co., vs. Ganah & Co. 510

4. It would even be an idle ceremony for one party to do certain acts on his part before suing for a breach of the contract, after the other declines complying with it on his part. *ib.*

5. Where the defendants refused a compliance with their contract for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for damages..... *ib.*

6. When the period within which a certain condition is to be performed has not yet arrived, the party is not *in morâ*, and the complaint of non-compliance is premature. In the meantime the adverse party must perform his part of the

but who never appears to have given time so as to preclude himself from suing and suspending his remedy to the prejudice of the endorser, the latter cannot complain or be exonerated... *Fortineau vs. Bossicré*. 470

15. Where the drawers of a bill depend for its being honored on the proceeds of a claim against the drawee, then in litigation, and take a receipt that it shall not be protested in case of dishonor, to save costs; they will not be considered as having funds in the hands of the drawee so as to entitle them to notice.

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2. So the consignee of a vessel *inwards* is not entitled to charge commission on the *outward cargo* as a customary charge unless he actually obtains an outward freight. *Tyson vs. Laidlaw*. 380

COMMUNITY.

1. Property purchased under the husband's own judgment becomes part of

the community ; although it may entitle him to the *price* which he paid for it, as a charge in the settlement of the community.

German et ux. vs. Nicholls et al. 361

COMPENSATION OF DEBTS.

1. A debt exists from the time it is contracted or *is due*; and not from the date of the judgment *only*, rendered thereon.....*Bach vs. Twogood et al.* 414

2. So where the plaintiff's demand *existed* anterior to notice of the transfer of defendant's debt against him, it will compensate and extinguish it as against the original creditor, notwithstanding he transferred it to a third person before the plaintiff obtained judgment on his demand..... *ib.*

CONTINUANCE.

1. Where the party takes his commission six months before trial to procure testimony, and makes no effort to obtain it, he has not used sufficient diligence to obtain a continuance.....*Rogers vs. Davis.* 50

2. A continuance will not be allowed because a public officer is called as a witness with his records at the moment of trial, and his records are locked up, his clerk having the key and absent at the time.....*Sidell vs. Locke.* 461

3. An affidavit by counsel stating the absence of the defendant, but that the latter expects to prove certain facts by a witness and has used all diligence to obtain him, is insufficient to grant a continuance.....*Burton vs. Maltby.* 591

CONTRACT.

1. Where a building contract is modified at the instance of the proprietor and a plasterer is employed separate from the contract with the builder, he will be entitled to recover of the proprietor independently of the original contract with the builder.....*McIntosh vs. Clannon.* 469

2. Where a creditor takes goods of his supposed debtor in his absence and sells them at a sacrifice, he is chargeable with them at the *price they are charged* at by the consignor.*Staunton vs. Cox's Syndic.* 508

3. Where a party declines a compliance with his part of the contract, the institution of suit, claiming performance of the contract or damages in the alternative is a sufficient putting of the defendant *in morâ*, if any was necessary.

New Orleans & Nashville Rail Road Co., vs. Ganah & Co. 510

4. It would even be an idle ceremony for one party to do certain acts on his part before suing for a breach of the contract, after the other declines complying with it on his part..... *ib.*

5. Where the defendants refused a compliance with their contract for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for damages..... *ib.*

6. When the period within which a certain condition is to be performed has not yet arrived, the party is not *in morâ*, and the complaint of non-compliance is premature. In the meantime the adverse party must perform his part of the

contract. *Priolaud vs. Huret et al.* 537

7. Where materials were furnished and work done on the defendants' premises and for their benefit, they are bound to pay the value, although the work was not stipulated for in the contract for other work done at the same time.

Giraghty vs. Saulet et al. 539

CO-PROPRIETORS.

1. According to the Civil Code of 1808, when property was acquired jointly by inheritance, purchase or otherwise, and could be partaken, it might be partitioned by cant or licitation to the highest bidder amongst the co-proprietors.

Porter vs. Depeyster. 351

2. When the co-proprietors were of full age, the licitation could only take place amicably and by private sale; but if they disagreed, were minors, interdicted or absent, the property could only be sold at public sale, after the usual advertisement, but any of the co-proprietors could purchase. This operated a mode of partition. *ib.*

3. So where joint property is sold after the death of one of the co-proprietors and purchased by the survivor, who is also the executor causing the sale: *Held*, that it was the effect of the *commune dividendo*, and the executor was not deprived of his right in common with the other co-proprietors to purchase.

Porter vs. Depeyster. 351

CURATORSHIP.

1. The curatorship must be given to a creditor of the deceased in preference to a person who is not such but only a *friend*. *Kaiser vs. Hoffman.* 493

2. A person to whom any house-rent is due by the deceased is a creditor and will be preferred for the curatorship to a stranger. *ib.*

3. The party failing in his application for a curatorship through the opposition of another or otherwise, must pay the expenses of the contestation. *ib.*

CUSTOM OF MERCHANTS.

1. It is not sufficient to prove the correctness of a charge to show it is a custom in New-Orleans among merchants, the law merchant is more extensive than the customs of a city. *Tyson vs. Laidlaw.* 389

DAMAGES.

1. An action for damages claiming \$500, for injury sustained in assaulting and beating the plaintiffs without provocation. Judgment for the full amount supported by the evidence and affirmed. . . . *Fredwest and wife vs. Daily et al.* 535

DOMICIL.

1. In a conservatory action, to enforce the provisions of a will, and cause to be rescinded the sale of certain slaves, made contrary to its provisions, a remote vendee of two of the slaves, residing in another parish, cannot be sued and made to answer at a different domicile than his own. *Poydras vs. Taylor et al.* 17

2. Where the defendant owned a plantation and dwelling house in a distant parish, where he has resided for several years, except occasional absence in travelling; and afterwards opened a commission house in New-Orleans, with a view to a commission business and his family living at a boarding-house: *Held*, that it is not such a change of domicile as will authorize a suit against him in two months afterwards at his new residence..... *Williams vs. Henderson.* 557

3. Defendant's domicile considered still in the parish where *he has resided* permanently, notwithstanding his removal to New-Orleans, with a view to the commission business there for a short time..... *Hall & Bein vs. Henderson.* 563

EMPLOYER AND EMPLOYEE.

1. To render the employer or hirer of a slave liable for the damage occasioned by him, it must be done through his neglect, while he is actually engaged in the functions or duties entrusted to him..... *Gaillardet vs. Demaris.* 490

2. Where the damage is done wilfully and wickedly by a slave hired to another, instead of doing it through neglect or unskilfulness, the employer is not liable. *ib.*

3. The employer is however liable for damages occasioned through the neglect, imprudence, or unskilfulness of his employee, whether he be a free person or a slave. *ib.*

EVICITION.

1. The *fear* of eviction or being disquieted in possession of real property, is no good reason to delay the payment of the price..... *Rogers vs. Davis.* 50

2. If the party knew of the incumbrance before he purchased, it is doubtful if he can even demand security when he fears eviction..... *ib.*

EVIDENCE.

1. The testimony of a witness not objected to will outweigh the statements of the defendant in his account so far as he charges the plaintiffs for the *amount* of his salary; but will be received as evidence of the credits he allows for moneys received by him..... *Whitney et al vs. Young.* 26

2. Where an agreement bears intrinsic evidence that the consideration had passed at its date, no evidence touching an averment of failure of consideration will be received..... *Heath vs. Locke et al.* 68

3. Copies of township maps are not admissible in evidence when better evidence can be procured..... *Millaudon et al vs M'Donough.* 102

4. So copies from public documents must be certified by the proper officer who is the keeper of the original. The surveyor general and not the register has authority to certify township maps to make them legal evidence..... *ib.*

5. Evidence which is introduced and received without opposition or objection, although contrary or beyond the allegations in the pleadings, the adverse party is bound by its effect..... *Powell vs. Aiken & Gwinn et al.* 321

6. Parol evidence is admissible to prove usury. This plea would seldom be available if required to be proved by a counter-letter or other written evidence.

Roasenda vs. Zabriske f. m. c. 346

7. Parol evidence is inadmissible to prove title to slaves, but a witness may be received to prove that the defendant admitted that he had received and held certain slaves as the agent of the plaintiff. *Penalta vs. Borges' Executor*. 348

8. The *initials* of a name, or the name of a person at full length marked on bales of cotton, is strong evidence of ownership.

Lee & Hardy vs. Palmer et al. 405

9. The testimony of two witnesses to the declarations of the deceased father, that he owed his daughter (the plaintiff) \$500, was received as evidence of the debt, although there was an attempt to discredit the testimony.

Rouzan vs. Rouzan's Curator. 425

10. Parol evidence is *inadmissible* to prove any thing that was said or understood inconsistent with a written act; or any contract between the last purchasers and their immediate vendor, against the first vendor who was not privy to such contract. *Arnous vs. Davern et al.* 42

11. The authority of a clerk to sign the name of a mercantile firm to a letter of credit, addressed to a particular person, when denied may be shown by circumstantial evidence, when there is no direct proof.

Moseley vs. Keys & Roberts. 46

12. An account for boarding and expenses of last sickness, which depends on inspection and proof, the judgment of the court *a quâ*, in which the witnesses appeared and testified, will have great weight.

Smith vs. Dickinson's Executor. 507

13. Heirship may be proved by parol evidence, when it does not appear, or is not shown, there was a register of marriages, births and deaths in existence. The latter will not be presumed, as it must be positively proved, that such register does exist. *Guerin's heirs vs. Bagneries*. 590

14. Parol evidence will be received to identify a slave which was inherited by the plaintiffs' mother from her father's estate, and to show her *possession* of said slave as part of the inheritance. *ib.*

15. So parol evidence is admissible to *identify property* of a succession, accepted by an heir after having shown his right to inherit; or to identify slaves born on a plantation when the owner possesses by no written title. *ib.*

EXECUTORS.

1. The Judge of Probates has the faculty and power given him to appoint dative testamentary executors, but it is a faculty he is to exercise according to law, and not in accordance with his will and pleasure; appointing whom he chooses. *Girod's Heirs and Legatees vs. Girod's Executors*. 394

2. The beneficiary heirs are first entitled to be appointed dative testamentary executors, when the testator has failed to name any in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit and according to the rules provided for the administration of such successions. *ib.*

3. Where beneficiary heirs are appointed dative executors to a succession

administered with the benefit of inventory, they are required to give security in the same manner as curators of estates.

Girod's heirs and legatees vs. Girod's executors. 394

4. Where strangers are appointed dative testamentary executors by the Judge, disregarding the applications of heirs and legatees, the appointment will be annulled. *ib.*

5. The Mayor of a City, receiving a legacy, *as trustee*, is not entitled to preference for the appointment of dative testamentary executor, as a legatee or creditor of the estate. Persons who receive a legacy *in trust* for others, have no more right of preference than the agent of a creditor or stranger. *ib.*

6. Notice of an application for the appointment of dative testamentary executors must be given, in all cases, in the same manner as for curators or administrators of estates. *ib.*

GARNISHEES.

1. Where garnishees are in possession of a slave, transferred to them in Mississippi by the surviving partner, in payment of a *debt due by the firm*, they will hold it against an attaching creditor of a new *firm*, of which this partner is a member. *Powell vs. Aikin & Gwinn et al.* 321

2. A garnishee has no right to interfere with the merits of the case between the plaintiff and defendant. *Lee & Hardy vs. Palmer et al.* 405

3. When the plaintiff obtains judgment against the defendant, all that is required is to obtain an order on the garnishees to pay over the funds of the defendant in their hands. *ib.*

4. The disclosure of the *time* of receiving and paying over certain monies by an attorney, who is garnishee, which he had received on account of his client, cannot be objected to as disclosing professional secrets.

Comstock et al. vs. Paie & Smith, &c. 479

5. So where the attorney, when cited as a garnishee to answer interrogatories, requiring him to state, if he had not received certain money of his client, and if he had, and had paid it over, to state when he paid it, and to whom; and he refused to answer, on the ground that it would be disclosing professional confidence: *Held*, that he was bound to answer, and his *refusal* was an *evasion*, making him liable for the whole debt, costs and damages. *ib.*

6. The rights of garnishees and their liability to pay, does not depend on privileges or preferences, but on their answers to the interrogatories propounded by the plaintiffs; subject however to be disproved. *Blanchard vs. Vargas et al.* 486

7. Where the garnishee's answer stated he had a certain amount of defendant's property in his possession, upon paying him \$468, he will be entitled to retain this sum, when his answer is not disproved. *ib.*

8. An order on a garnishee to pay over a certain portion of a claim in money when collected, arising from certain notes in his hands, does not affect the notes not yet collected. They still remain the property of the original owner and are liable to attachment by any of his creditors.

Branch Bank of Alabama vs. Kraft et al. 56

HEIRS.

1. A substitution of heirs to take effect at the death of the *gravatus*, or at an uncertain time, is to be considered conditional, and can only take effect on the happening of the event on which the condition depends.

Bernard's Heirs vs. Goldenbow. 95

2. Where the husband and wife institute the survivor of them *sole heir*, with condition and substitution, that at the death of the survivor, their property then existing, shall go to each of their heirs in certain proportions, it does not inhibit the survivor, while living, from *alienating* the property. *ib.*

3. The rights of the heirs of either of the spouses did not vest on the death of one of them, and could not, until the decease of the survivor; they acquired only an eventual right or hope. *Bernard's Heirs vs. Soulé.* 21

4. The legitimate daughter will inherit the property of her deceased mother, to the exclusion of an illegitimate son, not born in wedlock.

German et al. vs. Nicholls et al. 361

5. The beneficiary heirs are first entitled to be appointed dative testamentary executors, when none are named in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit, and according to the rules provided for the administration of such successions.

Girod's Heirs and Legatees vs. Girod's Executors. 394

6. Where beneficiary heirs are appointed dative testamentary executors to a succession administered with the benefit of inventory, they are required to give security in the same manner as curators of vacant estates. *ib.*

HUSBAND AND WIFE.

1. The husband and wife made a joint will and instituted each other sole and universal heir in case there was no children; with a proviso that at the death of the survivor any property or effects remaining unsold, should go to *their* heirs as legacies in certain proportions: *Held*, that the wife as the survivor became the absolute owner of all their property and could alienate it. But if any remained unsold at her death, it went to both *their heirs*. *Bernard's Heirs vs. Soulé.* 21

2. The rights of the heirs of either of the spouses did not vest on the death of one of them, and could not until the *decease of the survivor*; they acquired only an eventual right or hope. *ib.*

3. The husband has the power of administering the estate of his wife, whether it be dotal or paraphernal, particularly her moveable property.

Clarke et ux vs. Fireman's Insurance Company. 431

INJUNCTION.

1. The appellant from a judgment dissolving an injunction, obtained against an order of seizure and sale, cannot take a suspensive appeal without giving security as in other cases of such appeals. Security for costs is not sufficient.

State vs. Judge of 3d District. 444

2. The article 740 of the Code of Practice is an exception to the rule requiring security in obtaining an injunction to stay an order of seizure and sale, but only applies to that class of cases. *ib.*

3. An injunction should not be granted to suspend an execution, on the ground that the petition for a suspensive appeal and appeal bond, were lost before the appeal was granted. *State vs. Judge of First District Court.* 542

INSOLVENCY.

1. A purchasing creditor retaining the price, is bound to refund and pay over his share of the law charges of an insolvent estate.

Monbouchet's Curator vs. Ferraud fils. 372

2. In order to constitute a fraud, two conditions are necessary ; there must be the *intention* of defrauding, and the event or actual loss sustained by the creditors to deprive the debtor of the benefit of the insolvent laws.

Montilly vs. His Creditors. 383

3. Where the charge of fraud is made against a ceding debtor, in order that the court may judge of the nature and *extent* of the fraud, and to determine whether the acts complained of come within the purview of the law, they should be clearly and distinctly specified in the written opposition ; general allegations are not sufficient. *ib.*

4. So where the allegations are mere matters of legal right, subject to be disputed and controverted in the *concurso*, they do not amount to a *fraud* against creditors within the meaning of the 22d, 23d and 24th sections of the act of 1817, and 10th section of the act of 1840, relating to insolvent debtors. *ib.*

5. The word "*deposition*" in the 18th section of the act of 1817, relating to voluntary surrenders of property, is a mistranslation or misprint from the French text ; and it evidently means "*opposition*." .. *Cassidy vs. His Creditors.* 402

6. An attorney may represent his constituent at a meeting of creditors, even when the latter is present in the city, where the meeting is held. *ib.*

7. The holder or endorser of a note not yet due, should be placed on the bilan of the insolvent debtor, as a contingent and conditional creditor, and made a party to the *concurso*. *Deslix vs. Schmidt.* 464

8. A creditor cannot be made a party to the insolvency of his debtor, if he is omitted to be placed on the tableau by a supplemental petition, filed after the insolvent proceedings are closed and homologated. *ib.*

9. So a creditor who is not put on the bilan and cited, is not bound by the insolvent proceedings, even if he be placed on the tableau of distribution, but declines receiving his dividend. *ib.*

10. Under the act of 25th March, 1808, for the benefit of insolvent debtors in actual custody, any creditor, at any stage of the proceedings, may make a charge and suggest fraud, to which the debtor must plead, and the issue is to be tried by a jury. *Parlange vs. His Creditors.* 475

11. The debtor cannot avoid this issue by denying the creditor's right to vote for or against his discharge, because his claim is not proven by a notarial act, &c. There is nothing in the law requiring the creditor to give his vote before filing the suggestion of fraud therein alluded to. *ib.*

12. Under the act of 1808, although the insolvent failed to deposit his books in the clerk's office at the time of his application, yet he may be permitted to do

- so, as soon thereof as they were *called for*; even after opposition filed.
Porter vs. His Creditors. 495
13. Where the opponent alleges, *he believes* the insolvent has omitted to put all his property in his schedule, it will not be considered a charge of fraud. *ib.*
14. The loss of a part of insolvent's books, shown by his own affidavit, and that of another person taken *ex parte*, and letters and hearsay evidence, if received without objection, will be deemed sufficient. *ib.*
15. Where there were no creditors in court opposing the discharge, there is no obstacle to his liberation under the act of 1808. *ib.*
16. When the opposition does not contain an actual charge of fraud, a jury need not be empannelled to try it. *ib.*

INSURANCE.

1. Although a vessel may be old, and when injured by sea accidents, require more repairs than a new one, yet the insurers are nevertheless bound for the necessary repairs to place her in *statu quo*. *Fisk vs. Commercial Insurance Co.* 77
2. The insurers are liable for damages done to Zinc, occasioned by the salt water getting to and corroding it on the voyage.
Cogswell & Co. vs. Ocean Insurance Company. 84
3. As the administrator of his wife's property, the husband has such an interest and right therein, as authorizes him to insure it even in his own name, without declaring the nature and extent of his interest.
Clarke et ux vs. Fireman's Insurance Company. 431
4. Where the policy has reference to furniture generally in a house which is described, without mentioning that part of it was stored in the garret, it is sufficient to authorize a recovery for the loss. *ib.*

INTEREST.

1. Where a note does not bear interest on its face, but the act of mortgage taken to secure its payment, stipulates for the payment of 10 per cent. interest from *maturity* of the note until paid, the excess charged from its date will be deducted. *Roasenda vs. Zabriskie, f. m. c.* 346

INTERROGATORIES AND DEPOSITIONS.

1. Either party has a right to interrogate his opponent; and the penalty for not answering is, that the interrogatories are to be taken *pro confesso*.
Baine vs. Wilson. 59
2. The party propounding interrogatories has only to obtain the order of court to have them answered. The adverse party is bound to answer at his peril. *ib.*
3. Where the answers are to be taken out of the Parish, a commission issues, and the party interrogated on notice of the time and place of answering given, answers so that the person propounding the interrogatories may be present. *ib.*
4. A commission is necessary to take the answers to interrogatories out of the State, in like manner as for a distant Parish within it. *ib.*
5. The mere production of a commission is not sufficient to authorize the

person to administer an oath and take the answers, as it does not prove he is the actual person named in the commission, who swore the party. *Baine vs. Wilson.* 59

6. A commission from the governor that such a person was a magistrate in 1838, does not establish the fact, that he was one in 1840, the *time when he acts as such.*..... *ib.*

7. When a commission is directed to a person by name, no proof of his authority or identity is required; but when directed to *any judge* or justice of the peace out of the State, it must be shown that he *is such an officer*, at the time he acts and purports to be..... *ib.*

8. When the answers to interrogatories make out the plaintiff's case, and are not disproved, he will have judgment. *Beach et al. vs. Oakey.* 413

JUDGMENT.

1. The recitals of the evidence given in the opinion of the court or judge, who tries the case, *is not sufficient.* This court must have the evidence itself.

Tait vs. De Ende's Executors. 33

2. A copy of a naked judgment may be admissible in evidence, but it is not sufficient to make proof of the matters contained in it..... *ib.*

3. The whole of the record must accompany the judgment of a foreign tribunal, to give it effect in our courts. *ib.*

4. Judgment amended for allowing five, instead of four per cent. interest; and for want of amicable demand, the appellee paying costs in both courts after the appearance of the defendant. *Vairon vs. Debergue.* 40

5. Judgment of the inferior court corrected and amended by consent of parties; being erroneous on its face and the error only discovered after it became final. *Commercial Bank of Rodney vs. Hinds.* 49

6. Where a judgment states, "the court being satisfied that the plaintiff's claim is correct," it is a sufficient constitutional reason to support the validity of the judgment..... *Slidell vs. Locke* 461

7. The order of the Court of Probates for the registry and execution of a will and appointment of a dative testamentary executor forms a judgment, which must have its effect until reversed by appeal or action of nullity.

Derbigny vs. Peirce, &c. 551

8. An action of a nullity of judgment will not lie unless for some one of the enumerated grounds in the Code of Practice. *ib.*

9. Appeal for delay and judgment affirmed with the maximum of damages.

Goesden vs. Morrison. 584

10. Judgment affirmed with the maximum of damages as a delay case.

Lavigne vs. Theurer et al. 582

11. Judgment affirmed, on the abandonment of part of the defence and admissions of the defendant..... *Dufour & Co. vs. Meffre.* 581

JURISDICTION.

1. Every court has jurisdiction to compel obedience to its orders.

Monbouchet's Curator vs. Ferraud fils. 371

2. On the suggestion of the death of the plaintiff, during the pendency of the suit, in a court of *ordinary and general jurisdiction*, it has no power to appoint

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<i>a curator to represent his heirs.</i>	<i>McManus vs. West; Odom Intervenor.</i> 41

JURY.

1. In actions of tort, which from the nature of the demand, damages are to be assessed, a jury must be summoned to find the same. The court alone cannot assess damages in such cases. *Olivier, Curator, &c. vs. Cannon.* 474

LAND LAWS AND TITLES.

1. The court will look beyond the confirmation of a claim by the land commissioners or Congress, emanating from the former governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed.
Millaudon et al. vs. McDonough. 102
2. When the expression in a grant or title only conveys a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear and thereby obtain more than the superficies contained in a parallelogram. *ib.*

LESSOR AND LESSEE.

1. Builders who contract with tenants for the repair and alteration of the leased premises and have their contract recorded, have no lien or privilege on the property under lease. There is no privity between the builder and owner of the leased property; and the mere consent given in the lease to make the alterations on the premises, renders the lessor in no way liable to the builder.
Hoffman vs. Laurans et al. 70
2. The lessor is not bound to pay for improvements or alterations made on the leased premises by the tenant, when they are not advantageous to him. *ib.*
3. In an action of damages for the non-compliance of the lessor with his contract of lease, the plaintiff must prove that he put the defendant in *default* in one of the modes pointed out by article 1905 of the Louisiana Code, before he can recover. *Taylor vs. Chase.* 88
4. When the lessor takes possession of the leased premises in an unfinished state, and he does not at the time notify the lessor, that he would be held responsible for the delay in finishing them, he cannot recover damages sustained by their non-completion. *ib.*
5. The fact of the lessee taking possession of the leased premises does not entitle him to damages sustained by their unfinished state; as it does not amount to a putting in default according to law. *ib.*
6. There is no difference between a dwelling house and stores in relation to the rights of the lessor on the effects of the lessee and *under-lessee*; and persons who pay storage on their goods in a warehouse, are liable to the landlord's privilege as *sub-lessees*. *Vairin & Co. vs. Hunt et al.* 498
7. But the goods or effects of the sub-lessees or persons storing property in a warehouse, are liable to the proprietor's right of pledge or privilege *only* for so much as *they may be owing at the time this right is enforced*. *ib.*

LEVEES AND STREETS.

The decision of a jury of twelve "inhabitants," or land-holders, under the act of 15th February, 1808, respecting "the police of the shores of rivers," direct-

ing the construction of a levee for the protection of a Faubourg, of certain dimensions and fixing its location, is conclusive on the necessity and propriety of the measure, and the City Council have the power to cause the execution of the work..... *Hansen et al. vs. City Council of Lafayette.* 295

2. In a controversy about the location of a levee, parol evidence will be received to show *where* the old levee stood, and the new one proposed to be; and also that the adverse party was trespassing on a *public place*, administered for the public use..... *ib.*

3. The use of the banks of navigable rivers, is a servitude for the public use or common utility; and every proprietor, adjacent to the shores of navigable rivers is bound to leave sufficient space for levees, roads, [streets] and other public or common works..... *ib.*

4. The charter of the city of Lafayette, gives the city council the entire control of the streets, levees, wharves, &c.; confers on the corporation the same powers granted to the city of New-Orleans over these objects; and it is subrogated to the powers of the Police Jury of the parish of Jefferson, within the limits of the city..... *ib.*

5. No man or individual proprietor of the banks of a navigable river, can appropriate them exclusively to his own use, and at his pleasure to construct levees or erect buildings and works that will obstruct the free use of its banks *to all men*, although the right of property is in him as proprietor of the adjacent lands..... *ib.*

6. A re-hearing allowed on the question of damages, respecting the right of plaintiffs, as front proprietors to be paid for the property taken or destroyed in making the new levee..... *ib.* 309

NEW TRIAL.

1. Where one of the jurors becomes interested in the case during the trial, it is good ground to award a new trial..... *Turner vs. Latorre et al.* 74

2. Where it is clear a cause is not in a proper *condition* to decide on the important and delicate question involved, and the justice of the case requires it, it will be *remanded for a new trial*, rather than a judgment of non-suit entered.

Morehouse's heirs vs. Mayor et al. 316

3. Motions and affidavits for new trials on the ground of newly discovered evidence should be received with great restriction and much caution.

Burton vs. Maltby. 531

NEW-ORLEANS.

1. A contract entered into by the corporation of New-Orleans before its division into Municipalities must be enforced against the whole city, or the commissioners of the sinking-fund representing it; and not against any one of the Municipalities separately, although the work performed may have enured to its particular benefit..... *Levey vs. Municipality No. 3.* 312

PARTNERSHIP.

1. The purchase of household furniture for the use of one of the partners, although occasionally used to entertain the customers of the firm, cannot come within the scope of the partnership..... *Gray vs. Tiernan, Cuddy & Co.* 53

2. A partnership is not bound for a note signed by one of the partners with the partnership name, and which is shown to have been given for the price of furniture for his individual use..... *ib.*

3. After the dissolution of a partnership; neither of the partners can bind the other or the firm without special authority derived from a new contract between them. Such a contract is essentially one of mandate.

Fisk, Watt & Co. vs. Mead. 332

4. So where a partner drew a bill of exchange in the name of a firm which had been dissolved, on one of the partners, and waived acceptance and presentation to the drawee: *Held*, that the latter is not bound, or in any way liable for the payment of said draft..... *ib.*

5. When the articles do not contain a clause that the partnership might be dissolved at the will of one of the parties, simply by withdrawing from it, and the other refuses to consent, it becomes necessary for the complaining partner to apply to the court for a dissolution..... *Bruce vs. Ross et al.* 341

6. But in case of violation of any of the articles of partnership by one partner, the other may dissolve the partnership, even without a stipulation to that effect. *ib.*

7. Where a partnership has been properly dissolved by the judgment of the inferior court, and a liquidation ordered, it will be carried into effect by this court..... *ib.*

8. Where a partner accepts a draft in the name of the firm, but which is for his individual benefit, or payment, the other partner may be subrogated to the creditor's rights and recover the amount from his co-partner.

Hall vs. Gaiennie et al. 442

9. It is the general and settled jurisprudence, that on the dissolution of a partnership, all debts due by it, must first be paid, before there is a division among the partners; the fund remains a common stock and pledged for the payment of the debts of the firm..... *Claiborne & Mather vs. Their Creditors.* 501

10. The partnership in a steamboat is dissolved by the destruction of the boat which was the object of the contract of partnership; and the insurance money arising from the loss of the boat becomes a fund out of which all the creditors of the partnership must be first paid..... *ib.*

11. Creditors have a right of preference or privilege on the partnership fund to be first paid; and no partner can assign his share, until the debts of the firm are paid. *ib.*

12. So where two partners make a surrender of the partnership affairs with their own, the third partner who is solvent, cannot take out or assign his share of the partnership fund until the partnership debts are first paid..... *ib.*

13. The balance to the credit of a partner or his individual account, over and

above the debit, should belong to him exclusively and not one half go to the other partner..... *Burton vs. Maltby.* 531

14. Where a witness swears that what is written in a certain document is correct, it does not imply that it *contains a full statement*, of all the affairs of the partnership; as he does not swear that it contains every thing relating to the partnership affairs. *ib.*

PAYMENT.

1. The payment by the clerk of a court, in which money is deposited, to the attorney of the party entitled to receive it, is a good payment and will discharge the clerk from all liability..... *Mayer et al. vs. Hennem* 428

2. The resignation and subsequent failure of one of the plaintiffs in a judgment, who was sheriff, furnish no excuse for the defendant to withhold payment to his successor in office..... *State vs. Judge of District Court.* 542

PLEADINGS.

1. A plea denying the consideration, requires the plaintiff to prove it; but if there be also a plea of failure of consideration, the party himself must show it. *Tissott et al. vs. Bowles.* 99

2. Costs on leave to amend pleadings are not required to be paid up before the suit proceeds, as in case of non-suit or discontinuance. *McCabe vs. Gentes.* 89

PLEDGE.

1. A Bank, authorized to discount as incident to lending money, may take security; so also it may lend money on the faith of a cotton crop; and cause the cotton to be shipped by an agent to be sold to reimburse the loan without violating its charter..... *Debach vs. Jones et al.* 447

2. Where, in a common law State, a party pledges his cotton crop for a certain sum advanced to him, and the pledgee is authorized and required to sell the cotton for reimbursement: *Held*, that as a pledge, it was defeasible, before delivery, but *afterwards* the contract was complete..... *ib.*

3. Delivery is essential to the validity of a contract of pledge in a common law State; and even a parol agreement followed by delivery, is legal and binding on the parties and third persons..... *ib.*

4. In a case of pledge or bailment of goods or personal property, without limitation of time for redemption, the creditor may call on the debtor to redeem after his debt is due, by having a judicial sale, under a decree of foreclosure; or upon giving a reasonable notice to the debtor to redeem. But the parties may stipulate as to the *time* and *mode* of sale..... *ib.*

5. So a contract partaking of the features both of pledge and of an assignment in trust to secure the payment of a debt, is valid in a common law State. *ib.*

6. So where cotton is pledged to secure payment of a loan of money and delivered to the agent of the creditor, making the advance, who ships it to be sold for the purpose of paying this loan; it is not liable to an attaching creditor in the hands of the consignee, who is made garnishee..... *ib.*

SURGEON.

1. Surgeons of regiments in the State militia have the same rank as those in the U. S. army, whose duty it is to attend those who may be wounded in the service or on parade as a militia man.....*Harral vs. Vanorsten.* 545
2. So a regimental surgeon cannot make a private charge and be entitled to compensation for dressing the wounds and curing a soldier wounded *on parade*, even when not in active or actual service..... *ib.*

VENDOR AND VENDEE.

The last purchasers or vendees, who assume the notes of their immediate vendor, given to his or the original vendor, cannot resist payment on the ground of any equities or conditions existing between them and their immediate vendor. The plaintiff or first vendor is a stranger to them.*Arnous vs. Davern et al.* 42

WARRANTY.

1. Where the purchaser under execution is evicted he is entitled to judgment over against the *seized debtor and seizing creditor*, on his warranty, but under article 711 of the Code of Practice, he *must first take out his execution* against the former and on the return of *nulla bona* may proceed against the latter.

Guarin's heirs vs. Bagneries. 596

WILL.

1. A foreign will, or one made in another State, *duly proved* in a competent court where it is made, the executors appointed by the testator may continue to act in this State, when the will has been registered in the Court of Probates in this State, where the property is situated.

State vs. Judge of Probates of New-Orleans. 570

2. So foreign wills or those made in other States do not require the appointment of a dative testamentary executor and an attorney for absent heirs, when ordered to be enregistered in this State. The executors or administrators appointed and qualified to act under the will in the place where it is probated can act under it in relation to property here..... *ib.*

WITNESS.

1. When a witness is asked how he knew certain facts about S. R. and answers that he was acquainted with the circumstances of S. R. ever since he could recollect, it will be sufficient to account for the facts stated.

Turner vs. Latorre et al. 74

2. The interest which disqualifies a witness must be the prospect of gaining an advantage, or to profit by the judgment in the cause, in which he is called to testify.....*Moffatt vs. Murray et al.* 357

3. The builder is a competent witness to testify in a suit between the plasterer and proprietor, for his wages, when the former has been employed independent of the building contract.....*M Intosh vs. Clannon.* 469

4. Since the passage of the act of 1823, excluding the testimony of the maker of a note, in a suit by the holder against the endorser, the maker cannot be admitted as a witness on any grounds; even if he be entirely *disinterested*.

Fortineau vs. Boissier. 470

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R. J. O.

